

## **BULKY DOCUMENTS**

(Exceeds 300 pages)

**Proceeding/Serial No: 91178747**

**Filed: 3-12-08**

**Title: APP and DEF'S MEMORANDUM (1) IN OPP  
TO OPP'S MOT FOR SUM JUD AND (2) IN SUPPORT  
OF CROSS-MOT FOR SUM JUD**

**Part 1 of 1**



IN THE UNITED STATES PATENT AND TRADEMARK C  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 76/613881  
For the Mark MANDARINE  
Published in the Official Gazette JUNE 5, 2007

MINE DESIGN D/B/A/ OF AMAL FLORES  
(U.S.),

Opposer,

v.

VOTIVO, LTD., a Washington corporation,

Applicant,

VOTIVO, LLC, a South Carolina Limited  
Liability Company,

Defendant

APPLICANT'S AND DEFENDANT'S  
MEMORANDUM (1) IN OPPOSITION TO  
OPPOSER'S MOTION FOR SUMMARY  
JUDGMENT AND (2) IN SUPPORT OF  
CROSS-MOTION FOR SUMMARY  
JUDGMENT

Opposition No. 91178747

**I. INTRODUCTION**

VOTIVO<sup>1</sup> holds valid federal trademark registrations for MANDARINE for use in connection with candles, tapers, skin soap, scented body spray, scented room spray, and incense (collectively, the "Existing Registrations"), dating back to 2003. VOTIVO has used the mark MANDARINE in connection with these home and personal care products dating back to 1997. The Existing Registrations have been found distinctive when applied to VOTIVO home and personal care products.

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<sup>1</sup>The relationship between VOTIVO, LTD., and VOTIVO, LLC, is discussed below; for convenience, they are hereafter collectively referred to as "VOTIVO."



03-12-2008

VOTIVO presently seeks to register MANDARINE in connection with two additional personal care products, bath salts and hand lotion (hereafter, "the Mark"). "Mine Design d/b/a of Amal Flores" (hereafter "Mine Design") opposes the registration of the Mark, and has moved for summary judgment on the sole basis of the alleged "genericness" of MANDARINE for bath salts and hand lotion.

On its merits, Mine Design's motion is facially deficient, failing even to prove the facts necessary to present a prima facie case that the Mark is "generic." Even if it attempted to do so, Mine Design could not prove the absence of genuine issues of material fact on the issue of genericness, and its motion should be denied.

However, as a critical threshold matter, Mine Design has no standing to oppose the mark. In a glaring omission and complete lack of candor with this tribunal, Mine Design has failed to disclose to the Board that Mine Design has been, and continues to be, *permanently enjoined* by the United States District Court (Central District of California) *from using the mark MANDARINE*:

1. [Mine Design], and its owners... and attorneys...are hereby permanently enjoined and restrained from:

\* \* \*

d. Using [Mandarine],... which is a subject of a United States trademark registration owned by VOTIVO, or any other term, symbol, trademark, service mark, domain name, trade name, or corporate or other entity name that is confusingly or substantially similar to [Mandarine]..., *in connection with* candles and tapers, burning sticks and incense, scented room sprays, scented skin soaps, scented body sprays, *and any other scented products for household or personal care use.*

Permanent Injunction, VOTIVO, Ltd. v. Mine Design, U.S. Dist. Ct. (Central Dist., CA 2005) No. CV 03-6017-DT (emphasis supplied), Exhibit 4 to the Declaration of

Steve Edmiston in Opposition to Opposer's Motion for Summary Judgment and in Support of Cross-Motion. Thus, as a matter of law Mind Design (1) lacks any "real interest" in the proceedings, and (2) lacks a reasonable basis for the belief of damage. Indeed, Mine Design is the proverbial "intermeddler" that must be dismissed because it does not raise "a real controversy."<sup>2</sup>

Because (1) the facts proving Mine Design's "intermeddler" status and lack of standing are not in dispute, (2) these same facts support dismissal of the Opposition based upon the doctrines of claim and issue preclusion, and (3) Mine Design has failed to present even a prima facie case in support of its summary judgment motion, VOTIVO requests that its Cross-Motion for Summary Judgment be granted, that Mine Design's Motion for Summary Judgment be denied, and that Mine Design's Opposition be dismissed with prejudice.

## **II. STATEMENT OF FACTS**

### **A. Prior litigation between VOTIVO and Mine Design.**

#### **1. The California federal district court lawsuits.**

Since 1996, VOTIVO<sup>3</sup> has specialized in the design, manufacture and wholesale of high-quality aromatic products such as scented candles, incense, soaps, room sprays, body and hand lotions, bath salts, and related products. Declaration of

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<sup>2</sup> *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ 1023, 1025 (Fed. Cir. 1999).

<sup>3</sup> VOTIVO, LLC, a limited liability company organized under the laws of the State of South Carolina, and VOTIVO, LTD., a corporation organized under the laws of the State of Washington, executed an Intellectual Property, Inventory, and other Physical Property Asset Purchase and Transfer Agreement, an Assignment of Trademark Interests, and Assignment of Intent-Based Trademark Interests, all on September 28, 2007, wherein VOTIVO, LLC acquired, among other things, all rights for the products at issue in this matter, including the trademark registrations and other intellectual property rights for U.S.P.T.O. Registration Nos. 2720908 and 2728815, and Serial No. 76/613881, for "Mandarine." Edmiston Decl., Ex. 14.

Robert E. Caldwell, Jr. ¶ 3; Edmiston Decl., Ex. 3, (Findings of Fact Nos. 2-4) and Edmiston Decl. Ex. 15 (Declaration of Edgar Lee ¶ 3, hereafter “Lee Decl.”). Prior to this Opposition proceeding, VOTIVO, Ltd. has twice litigated against Amal Flores, an individual doing business under the name “Mine Design,” in federal district court.<sup>4</sup> The primary claims by VOTIVO in each lawsuit were for trademark infringement. The first lawsuit was VOTIVO, Ltd. v. Mine Design, U.S. District Court for the Central District of California, Case No. CV 03-6017 (“Mine Design I”), filed in April, 2003. See Edmiston Decl., Ex. 1 (Complaint, Mine Design I) and Ex. 2 (Mine Design’s Answer and Affirmative Defenses of Defendant Mine Design to Plaintiff’s Complaint in Mine Design I).<sup>5</sup> In March 2005, VOTIVO, Ltd. brought a second action for trademark infringement, VOTIVO, Ltd. v. Amal Flores D.B.A. Mine Design, U.S. District Court for the Central District of California, Case No. CV05 2942 (“Mine Design II”). See Edmiston Decl., Ex. 9 (Verified Complaint, Mine Design II) and Ex. 10 (Mine Design’s First Amended Answer, Affirmative Defenses, and Counterclaims, Mine Design II).<sup>6</sup> During the pendency of Mine Design I and II, VOTIVO discovered that Mine Design was also selling products that infringed additional federally registered trademarks owned by VOTIVO, including MANDARINE. Edmiston Decl., Ex. 3.

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<sup>4</sup> In both cases Mine Design was represented by its present counsel, Carlos Candeloro.

<sup>5</sup> The VOTIVO trademark registrations initially at issue in Mine Design I were for RED CURRANT and SOKU LIME. As in the present case, Mine Design alleged that the subject marks were generic and not capable of trademark protection. *Id.*

<sup>6</sup> The VOTIVO trademark registrations initially at issue in Mine Design II were for TALL GRASS. As in the present case, Mine Design’s alleged it “has an interest in the use of ‘tall grass’ as a common descriptive term of the scent of tall grass.” *Id.*

On November 7, 2005, the Federal Court in Mine Design I entered Findings of Fact and Conclusions of Law, a Permanent Injunction, and a Final Judgment in favor of VOTIVO, including the following:

### FINDINGS OF FACT

2. VOTIVO is one of the country's leading manufacturers and distributors of home décor products, gift products and personal care products. Among the many products sold by VOTIVO are candles, burning sticks and incense, scented room sprays, skin soaps, and scented body sprays.

3. Since at least as early as 1999, VOTIVO has used a variety of distinctive trademarks to advertise and promote its products.

4. VOTIVO family of trademarks is distinctive when applied to VOTIVO products. Because of the excellent sales and extensive promotion of VOTIVO products, VOTIVO family of trademarks have become well known to consumers and others in the personal care, home décor and gift industries as identifying unique and desirable products of the highest quality that originate with VOTIVO.

5. Consequently, VOTIVO trademarks are very important and valuable business assets of VOTIVO, and represent significant business good will.

\* \* \*

14. *Since filing this lawsuit, VOTIVO also has discovered that – notwithstanding that VOTIVO already has sued Defendant for trademark infringement – Defendant has been marketing and selling products that infringe other registered trademarks owned by VOTIVO....*<sup>7</sup>

\* \* \*

### CONCLUSIONS OF LAW

6. Based upon the foregoing, the Court finds and concludes that the well-pled facts alleged in VOTIVO complaint and set forth herein establish that Defendant is liable to VOTIVO for: (a) federal trademark infringement; (b) violation of the Lanham Act Section 43(a); (c) violation of California Business & Professions Code section 17200 et

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<sup>7</sup> The Permanent Injunction identifies these as including the Mandarin trademarks.

seq.; (d) common law trademark infringement; and (e) common law unfair competition.

\* \* \*

8. Pursuant to Section 34(a) of the Lanham Act, 15 U.S.C. § 1216(a), the Court finds and concludes that a permanent injunction in the form requested by VOTIVO should be entered to prohibit Defendant, and all persons acting in concert and participation with Defendant, from infringing... (d) any and all other registered trademarks owned by VOTIVO.

9. For the reasons set forth in the July 15 Order, the Court finds and concludes that VOTIVO is entitled to an award of attorneys' fees in the amount of \$19,800 as well as an award of litigation costs pursuant to 28 U.S.C. § 1920.

Id., Ex. 3 (emphasis supplied). The Permanent Injunction states:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. *Defendant, and its owners, controlling persons... and attorneys...are hereby permanently enjoined and restrained from:*

\* \* \*

d. *Using any of the terms set forth on Exhibit "A" hereto, each of which is a subject of a United States trademark registration owned by VOTIVO, or any other term, symbol, trademark, service mark, domain name, trade name, or corporate or other entity name that is confusingly or substantially similar to the terms listed on Exhibit "A", in connection with candles and tapers, burning sticks and incense, scented room sprays, scented skin soaps, scented body sprays, and any other scented products for household or personal care use.*

2. Defendant shall take all reasonable steps to ensure that its owners, controlling persons... and attorneys, do not violate the terms of this Permanent Injunction....

3. This Court shall retain jurisdiction over the parties hereto for the purposes of any proceeding to enforce this Permanent Injunction. In the event Defendant, or any of its owners, controlling persons... and attorneys... violate any of the terms of this Permanent Injunction, VOTIVO shall be entitled to immediately seek an order to show cause as to why Defendant should not be held in contempt because of such violation. In the event the Court finds that any violation by Defendant

of the terms of this Permanent Injunction has taken place, VOTIVO shall be entitled to its reasonable attorney's fees and costs incurred in addressing such violation.

Edmiston Decl., Exs. 4-5. Exhibit A to the Permanent Injunction identified and included the VOTIVO registered trademarks for MANDARINE: U.S. Registration Nos. 2,720,908, and 2,728,815. Edmiston Decl., Exs. 4, 18-19.

The Court expressly retained jurisdiction for any subsequent proceeding to enforce the Permanent Injunction.<sup>8</sup>

## **2. Settlement of Mine Design I and II; dismissal of appeal.**

Mine Design appealed the Final Judgment to the Ninth Circuit, Case No. 06-55147. Edmiston Decl., Ex. 8. While the appeal and the Mine Design II trial case were pending, on May 5, 2006, VOTIVO entered into a Settlement Agreement with Mine Design. Edmiston Decl., Ex. 11. The parties agreed that the Mine Design I *appeal* would be dismissed. Id. The Settlement Agreement provides for ongoing enforcement of the Permanent Injunction by providing for the retention of jurisdiction by the federal court in Mine Design I. Id. The Settlement Agreement confirms the broad prohibition against Mine Design's use of all of the VOTIVO federally registered trademarks, including MANDARINE:

3. Use of VOTIVO Registrations. MINE agrees that he will not, directly or indirectly... use... (ii) any of the trademarks set forth in the Permanent Injunction provided such trademarks remain registered with the United States Patent and Trademark Office.

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<sup>8</sup> On December 27, 2005, the Mine Design I Court denied Mine Design's F.R.C.P. 59(e) Motion to Alter or Amend Final Judgment. Edmiston Decl., Exs. 6-7.

Edmiston Decl., Ex. 11. The parties also agreed to a release of all claims and/or liabilities “the Parties may have against each other... including any and all demands, claims, rights, obligations, liabilities, causes of actions... of whatever kind, nature or description... up until the EFFECTIVE DATE. Id., ¶ 7.<sup>9</sup> The parties agreed to the dismissal in Mine II lawsuit. Edmiston Decl., Exs. 12 and 13. (Copies of the dismissals of Mine I Appeal and Mine II lawsuit).

**B. VOTIVO history and aromatic design.**

For over a decade, VOTIVO has specialized in the design, manufacture and wholesale of high-quality aromatic home and personal care products such as scented candles, incense, soaps, room sprays, body and hand lotions, and bath salts. Caldwell, Jr. Decl., ¶ 3; Edmiston Decl., Ex. 3, (Findings of Fact Nos. 2-4) and Edmiston Decl. Ex. 15 (Declaration of Edgar Lee ¶ 3, hereafter “Lee Decl.”). VOTIVO demands top quality in its aromatic scents, and was one of the first in the industry to pay costs equivalent to “designer fragrance” costs for their fragrances. Edmiston Decl. Ex. 16 (Declaration of Harris Jones ¶ 9, hereafter “Jones Decl.”). VOTIVO sells its aromatic products in all fifty states and worldwide through a network of distributors and retailers such as Saks Fifth Avenue, Neiman Marcus and Nordstrom, as well as home furnishings boutiques and specialty gift stores. Caldwell, Jr. Decl., ¶ 7, 9; Lee Decl., ¶ 6.

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<sup>9</sup> Notably, as of the “Effective Date” (May 5, 2006) of the Settlement Agreement, VOTIVO’s Trademark Application for Mandarin in connection with bath salts and hand lotion had been pending for *over one and one-half years*, and therefore is clearly included within the scope of the release. Edmiston Decl., Exs. 11, 20,.

MANDARINE is plainly suggestive as applied by VOTIVO to the products. Based upon recognized fragrance industry standards, known as the Hedonic Scale, the recognition and association of fragrances and aromas is subjective and differs from person to person. Jones Decl., ¶ 7. Research also shows that fragrances and aromas can directly evoke strong emotions, moods and feelings in individuals. Jones Decl., ¶ 5. VOTIVO is in the business of stimulating these moods and feelings through the fantasy fragrances of its aromatic products. Lee Decl., ¶ 11. Scented products created by VOTIVO, including bath salts and hand lotions, are combinations of various synthetic and natural compounds. Caldwell, Jr. Decl., ¶ 15; Lee Decl., ¶ 11, Jones Decl., ¶ 6. These fragrance formulae are composed of various “notes” designed to hit olfactory receptors in much the same way that musical notes register to the ear. Jones Decl. ¶ 6. When created, each fragrance may contain top notes, middle notes and base notes which are layered together to elicit certain suggestive associations and/or feelings. Lee Decl. ¶ 11, Jones Decl. ¶ 6. Once a fragrance is found satisfactory, the designers at VOTIVO pair that aroma with a name, a fantasy fragrance that captures the suggestive register of the aromatic notes. Lee Decl. ¶ 10. Scientifically, fantasy fragrances and aromatic products are designed and promoted with a strong emphasis on the suggestive or conceptual “It reminds me of . . .,” rather than on the definitive “It is” olfactory association. Caldwell, Jr. Decl., ¶ 14-15; Jones Decl. ¶ 7.

Since 1997, VOTIVO has invested substantial sums of time, money and effort to develop, use, advertise and promote the MANDARINE marks. The MANDARINE

marks are promoted and advertised through showrooms, trade shows, the Internet and independent sales representatives; they are in a permanent showroom in Atlanta. Caldwell, Jr. Decl., ¶¶ 9, 12; (Lee Dec. ¶¶ 6-8).

As a result of the popularity of the goods, the Mandarin Marks have come to be associated exclusively with VOTIVO and serve to distinguish VOTIVO's products from the goods of other companies. Caldwell, Jr. Decl., ¶ 7; Buckley Decl., ¶ 6. VOTIVO aggressively and vigorously defends the integrity of its Marks. Caldwell, Jr. Decl., ¶ 8; Lee Decl. ¶ 5.

**C. The MANDARINE Marks.**

**1. The Existing Registrations for MANDARINE.**

On April 11, 2002, after five years of continued strong financial growth, rapidly increasing market share and remarkably sustained popularity, VOTIVO filed applications to register MANDARINE as a trademark with the U.S. Patent and Trademark Office (the "PTO"). In the course of seeking registration for the trademark, the Trademark Office found that MANDARINE had acquired distinctiveness or secondary meaning under Section 2(f). The trademark was registered on the Principal Register in mid-2003. Edmiston Decl., Exhs. 18 - 19.<sup>10</sup>

**2. Pending Application for MANDARINE.**

On September 22, 2004, VOTIVO filed a federal intent-to-use application to register MANDARINE in connection with *bath salts and hand lotion*. Edmiston Decl.,

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<sup>10</sup> These Existing Registrations, among numerous others, were expressly included within the scope of the Permanent Injunction entered against Mine Design, discussed above. Edmiston Decl., Ex. 4.

Ex. 20. On May 19, 2005, following an Examiner's Amendment/Priority Action stating that VOTIVO may seek registration under Section 2(f) by claiming acquired distinctiveness through ownership of U.S. Registration 2728815 (for MANDARINE), VOTIVO provided the Examiner the following statement:

The mark has become distinctive of the goods as evidenced by the ownership of U.S. Registration No. 2,728,815 on the Principal Register for the same mark for related goods or services.

Edmiston Decl., Exs. 21-22. VOTIVO provided a Statement of Alleged Use of the Mark on June 16, 2005, alleging actual use for bath salts and hand lotion beginning January 7, 2005. Notice of Publication issued from the PTO on June 5, 2007. Edmiston Decl., Ex. 23.

### **III. ARGUMENT**

Summary judgment should be granted if the record provided by the moving party demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (summary judgment is an integral part of the Federal Rules which are designed to "secure the just, speedy and inexpensive determination of every action."). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). If the evidence presented by the parties conflicts, the court must accept as true the allegations of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

**A. VOTIVO's Cross-Motion for Summary Judgment should be granted.**

**1. Mine Design has no standing to oppose.**

The Lanham Act, 15 U.S.C.A. § 1063(a) allows an entity to oppose a registration if it is or will be damaged by the registration of a trademark. The damage requirement relates to an entity's standing to oppose. The Federal Circuit emphasizes two judicially created requirements for standing for inter partes cases. The opposer must have: (1) a "real interest" in the proceedings; and (2) a reasonable basis for the belief of damage. Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed. Cir. 1999). The purpose of requiring standing is to prevent such proceedings from being brought by "mere intermeddlers" who "do not raise a real controversy from bringing oppositions... in the PTO." *Id.*; See also Golden State Salami Co. V. Gulf States Paper Corp., 332 F.2d 184 (C.C.P.A. 1964) (opposer cannot be intermeddler); Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982) (purpose of standing to weed out "intermeddlers" from those with "a personal interest in the outcome beyond that of the general public"); Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 217 U.S.P.Q. 641 (Fed. Cir. 1983) (only the basis for a reasonable belief of damage that is examined); 3 McCarthy on Trademarks and Unfair Competition, Sec 20:10 ("Intermeddlers" with no "personal interest in the outcome beyond that of the general public" do not have standing and must be "weeded out"). Even where proprietary rights in the mark are not required to oppose, an opposer must be able to assert an *equal* right to use the mark for the goods. *Id.*; Jewelers Vigilance Committee, Inc. V. Ullenberg Corp. 823 F.2d 490, 2 U.S.P.Q2d

2021, 2024 (Fed. Cir. 1987), on remand, 5 U.S.P.Q.2d 1622 (T.T.A.B. 1987) rev'd, 853 F.2d 888 (opposition sustained on the merits). Standing is properly resolved on summary judgment. Central Mfg. v. Surgical Navigation Technologies, Inc., 92 Fed.Appx. 789, 792 (Fed. Cir. 2004) (dismissal on summary judgment affirmed; opposition devoid of facts supporting standing).<sup>11</sup>

In Ritchie, opposer sought to prevent registrations of celebrity's proposed trademarks for his name and nickname, including "O.J. Simpson," "O.J.," and "The Juice." The Federal Circuit set forth two tests that must be met by an opposer: (1) the "real interest" test and (2) the "reasonable" belief of damage test. Ritchie, 170 F.3d at 1095. To establish a "real interest," opposer must show that it is *among* the subset of the general public that are in fact among the injured. *Id.*, at 1096; see also Stoller v. Ponce, 113 Fed.Appx. 403, 405-406 (Fed. Cir. 2004) (no standing where no admissible evidence provided to demonstrate a real interest).<sup>12</sup>

With respect to the second part of the test, the "reasonable" belief of damage, the Ritchie court required the opposer's belief of damage have a "reasonable basis in fact." *Id.*, at 1098. The court discussed several ways the opposer could meet this second test, including showing that (a) opposer "possesses a trait or characteristic that is clearly and directly implicated by the opposed trademark," and (b) that others share the same belief of harm from the proposed mark (i.e., the facts show "the belief is not simply the opposer's point of view") *Id.*, at 1098. To meet this second showing the opposer must use surveys or public opinion or petition evidence, or affidavits from

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<sup>11</sup> Opinion appended to the Memorandum.

<sup>12</sup> Opinion appended to the Memorandum.

public interest groups, representing the people allegedly sharing the damage caused by the mark. Id.

Here, Mine Design is the textbook definition of “intermeddler.” As a result of two prior federal lawsuits, the entry of the Permanent Injunction, and the Settlement Agreement with VOTIVO, Mine Design simply *does not* possess a “real interest in the proceedings.” Because Mine Design cannot market bath salts using the name “mandarin” without being *in direct violation of the terms of the Permanent Injunction*, Mine Design cannot in good faith demonstrate (as required by the first prong of Ritchie) that it could be *among* the subset of the general public that conceivably could be among the allegedly “injured.”

Similarly, under the Settlement Agreement, Mine Design released all claims, including unknown claims, through the date of the Settlement Agreement. Since the application for the Mark had been pending for over one and one-half years, the release includes claims by Mine Design relating to the Mark.

It is equally impossible as a matter of law for Mine Design to meet the second prong of the test under Ritchie, that it reasonably believes that it can somehow be damaged. Again, because Mine Design has been enjoined from using the trademark MANDARIN, and has released its claims relating to the Mark, it cannot show that it “possesses a trait or characteristic that is clearly and directly implicated by the opposed trademark.” Mine Design has also failed to offer any third-party evidence, also as suggested by Ritchie, that its belief of damage “is not simply the opposer’s point of view.” Id. Mine Design presents no surveys or public opinion or petition

evidence, nor affidavits from public interest groups representing the people allegedly sharing the damage caused by the mark. See Ritchie 170 F.3d at 1098; McDermott v. San Francisco Women's Motorcycle Contingent, 240 Fed.App. 865 (Fed. Cir. 2007) (affirmed dismissal on standing grounds; opposer did not meet any methods of establishing standing discussed in Ritchie, and specifically did not establish a trait or characteristic implicated by the proposed mark, nor established that others share same belief of harm through surveys, petitions, or affidavits from public interest groups).<sup>13</sup> Here, Mine Design has been permanently enjoined from using the Mark, has released claims relating to the Mark, and has presented no evidence to establish standing. It is difficult to imagine a worse set of facts for Mine Design, or a more appropriate instance to summarily dismiss an opposition.

**2. The estoppel doctrines of claim preclusion and issue preclusion prohibit Mine Design from opposing VOTIVO's MANDARINE mark.**

Res judicata encompasses two separate bars to relitigation, claim preclusion and issue preclusion. See Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988), appeal after remand, 918 F.2d 1439, 16 USPQ2d 2015 (9<sup>th</sup> Cir. 1990). Claim preclusion bars claims that could have been asserted in the prior action, whether or not they were. See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1078 (9th Cir.2003). Issue preclusion, by contrast, "prevents relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding." Robi, 838 F.2d at 321. The doctrines of claim and

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<sup>13</sup> Opinion appended to the Memorandum.

issue preclusion are appropriate for summary judgment because if a matter has been previously determined, there remains no triable issue of fact or law. McCarthy on Trademarks and Unfair Competition § 32:87; Robi, 838 F.2d 321.

**a. Claim preclusion bars this Opposition.**

The three elements for claim preclusion are: (1) an identity of parties; (2) an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first. Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360 (Fed. Cir. 2000). Even a default judgment can give rise to claim preclusion. International Nutrition Co. v. Horphag Research, Ltd., 220 F.3d 1325 (Fed. Cir. 2000).

Here, every element of claim preclusion is present. The Mine Design I and II cases involved (1) the same parties; (2) an express final judgment on the merits of the claim (including findings of fact and conclusions of law establishing the ownership, use, distinctiveness, and validity of VOTIVO's MANDARINE registrations, and a permanent injunction prohibiting Mine Design from using MANDARINE for home and personal care products); and (3) the current Opposition asserts claims based upon validity of the MANDARINE mark for home and personal care products. Claim preclusion clearly applies.

**b. Issue preclusion bars this Opposition.**

Collateral estoppel, or "issue preclusion," applies to resolve, in a subsequent action, a factual issue that has been conclusively determined in a previous lawsuit. The defense of collateral estoppel applies if four elements are met:

- (1) identity of the issues in a prior proceeding;
- (2) the issues were actually litigated;
- (3) the determination of the issues was necessary to the resulting judgment; and,
- (4) the party defending against preclusion had a full and fair opportunity to litigate the issues.

Jet, Inc. v. Sewage Aeration Systems, supra 223 F.3d at 1366 (Fed. Cir. 2000); Blonder-Tongue Lab. V. University of Illinois Found., 402 U.S. 313, 91 S.Ct. 1434 (1971); Pignons S.A. de Mecanique de Precision v. Polaroid Corp., 701 F.2d 1, 217 USPQ 513 (1<sup>st</sup> Cir. 1983) (collateral estoppel in second suit after first suit dismissed for failure to show damage; second suit “nothing more than garden variety forum shopping”). The prima facie case for demonstrating issue preclusion is set forth plainly in the Mine Design I Court’s Findings of Fact, Conclusions of Law, and Permanent Injunction (establishing, as between Mine Design and VOTIVO, ownership, validity, distinctiveness and usage in favor of VOTIVO for MANDARINE in connection with all home and personal care products).

**C. Mine Design’s Motion for Summary Judgment based upon genericness must be denied.**

Genericness is a question of fact for which summary judgment is typically inappropriate. Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925 (9<sup>th</sup> Cir. 2005). Case law recognizes “four different categories of terms with respect to trademark protection: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.” Surgicenters of America, Inc. v. Medical Dental Surgeries

Co., 601 F.2d 1011, 1014 (9th Cir.1979) (citing Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir.1976) (Friendly, J.)); Filipino Yellow Pages, Inc. v. Asian Journal Publications, Inc. 198 F.3d 1143 C.A.9 (Cal. 1999).

A "generic" term is one that refers, or has come to be understood as referring, to the genus of which the particular product or service is a species, and it cannot become a trademark under any circumstances. Surgicenters, 601 F.2d at 1014 (citing Abercrombie, 537 F.2d at 9-10). As explained by one commentator, a generic term is "the name of the product or service itself-what [the product] is, and as such ... the very antithesis of a mark." 2 J. Thomas McCarthy, Trademarks and Unfair Competition § 12:1[1] (4th ed.1997).

Because a finding of genericness may result in the loss of rights which could be valuable intellectual property, a court should not find genericness without persuasive and clear evidence that the contested term has become generic among a majority of the buyer group. As Judge Posner remarked: "To determine that a trademark is generic and thus pitch it into the public domain is a fateful step." Ty Inc. v. Softbelly's Inc., 353 F.3d 528, 69 U.S.P.Q.2d 1213, 57 Fed. R. Serv. 3d 637 (7th Cir. 2003) (Adding the observation that: "The fateful step ordinarily is not taken until the trademark has gone so far toward becoming the exclusive descriptor [sic] of the product that sellers of competing brands cannot compete effectively without using the name to designate the product they are selling.")

The appropriate test for genericness is whether the relevant public perceives the term primarily as the designation of the article. Blinded Veterans Association v.

Blinded Veterans Foundation, 872 F.2d 1035, 1041 (D.C.Cir.1989). Nartron Corp. v. STMicroelectronics, Inc. 305 F.3d 397 C.A.6 (Mich. 2002). In deciding genericness, evidence of the relevant public's understanding of a term "may be obtained from *any competent source*." In re Merrill, Lynch, Pierce Fenner & Smith, Inc., 828 F.2d 1567, 1570 (Fed.Cir.1987) (emphasis added). Relevant evidence of genericness includes dictionary definitions, newspapers and other publications, generic use by competitors, generic use of the term by the mark's owners, and use of the term by third parties in trademark registrations. Abercrombie, 537 F.2d at 12 (2d Cir.1976); In re Northland Aluminum Prod., 777 F.2d 1556, 1559 (Fed.Cir.1985); Tektronix, Inc., v. Daktronics, Inc., 534 F.2d 915, 916-17 (C.C.P.A.1976); *see also* Frito-Lay, Inc. v. Bachman Co., 704 F.Supp. 432, 440 (S.D.N.Y.1989). Nartron Corp. v. STMicroelectronics, Inc. 305 F.3d 397 C.A.6 (Mich. 2002).

**1. Opposer has presented no relevant evidence of genericness.**

First, Opposer disingenuously refers to the mark as "*mandarin scented bath salts*;" the mark at issue in this opposition is MANDARINE. The relevant inquiry is whether the mark MANDARINE is generic for *bath salts and hand lotion*; not whether "*mandarin-scented bath salts*" is generic for *bath salts and hand lotion*. The relevant inquiry for genericness was discussed by McCarthy in his treatise, and adopted by a number of courts:

A mark answers the buyer's questions 'Who are you? Where do you come from?' 'Who vouches for you?' But the name of the product answers the question "What are you?" ... [G]eneric designations tell the buyer what the product is, not where it came from.

McCarthy on Trademarks, § 12:1, citing United States Jaycees v. San Francisco Junior Chamber of Commerce, 513 F.2d 1226 (9th Cir.1975) and CES Publishing Corp. v. St. Regis Publication, Inc., 531 F.2d 11 (2d Cir.1975), among other cases. Also see General Mills, Inc. v. Kellogg Co., 824 F.2d 622 (8<sup>th</sup> Cir., 1987) (APPLE RAISIN CRISP held not generic as applied to cereal: “the generic name for [plaintiff’s] product would seem to be ‘breakfast cereal’, not ‘apple raisin crisp’”).

Opposer, oddly, in a declaration from its attorney of record, has submitted the following dictionary definition of mandarin: “a small spiny orange tree of southeastern Asia with yellow to reddish-orange loose-rinded fruits...[and] the fruit of a mandarin;” and a photograph of mandarin oranges in light syrup as evidence of genericness. Mine Design Exhs. 1 and 2. However, these exhibits are relevant to show only that MANDARINE could be generic in connection with *fruit*. They are patently irrelevant to prove the mark MANDARINE is generic for *bath salts and hand lotion*.

Opposer’s remaining exhibits are equally immaterial to its genericness argument. Opposer claims “mandarin is commonly used by producers of food . . . to describe products having the scent and/or taste of mandarin, and cites the Candeloro Declaration, ¶¶ 6-9 in support. Mine Design Brief, Sec. II, ¶ 4 Counsel’s declaration in ¶¶ 6 and 7, respectively, refer to a “Mandarin-flavored Green Tea,” and a “Mandarin-flavored sparkling water,” in describing the contents of Exhibits 3 and 4, respectively. Exhibit 3 merely shows a product labeled “Jones Organics Green Tea – Mandarin, “ and Exhibit 4 shows a product labeled “”Low Calorie Sparkling

Mandarin.” Not only do these exhibits not support the declarant’s contention, but because they refer to goods unrelated to those identified by the Applicant in its trademark application the evidence is irrelevant to whether MANDARINE is generic for *bath salts and hand lotion*.

Opposer’s next exhibits, printouts of “Mandarin Orange and Patchouli scented body lotion” and “Mandarin Pure Essential Oil” are also irrelevant, since the mark at issue in this Opposition is MANDARINE, not “Mandarin Orange and Patchouli” or “Mandarin Pure Essential Oil”. Finally, Opposer’s remaining exhibits (relating to bath salts) do not reference the term MANDARINE at all, and should be given no weight.

**2. Authority cited by Opposer is inapposite.**

Opposer’s reliance on Andes, Gyulay, and American Greetings is misplaced as those cases did not address the issue of genericness. Application of Andes Candies Inc., 478 F.2d 1264 (CCPA 1973); In re Gyulay, 3 U.S.P.Q. 2d 1009 (Fed. Cir. 1987); In re American Greetings Corp., 226 U.S.P.Q. 365 (TTAB 1985). Opposer makes the unsupported and convoluted argument that while these cases clearly addressed the separate issue of secondary meaning in connection with descriptive terms (an issue not raised in Opposer’s motion), this “does not negate that the terms *would have been held* generic *if* the issue had been properly considered under the primary significance test, something the three decisions notably failed to do.” Mine Design’s Motion for Summary Judgment, p. 8-9 (emphasis added). The gross speculation of what the

genericness holding of these cases “*would have been*” had the issue been before these courts is entirely irrelevant to this case.

3. **MANDARINE is a suggestive mark which is inherently distinctive. If mandarin fruit was a component ingredient in VOTIVO’s products, it does not follow that MANDARINE is a generic mark.**

A term is suggestive if “imagination” or a “mental leap” is required in order to reach a conclusion as to the nature of the product being referenced. Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 911 (9th Cir.1995); Surgicenters, 601 F.2d at 1019 (internal quotation marks omitted). Suggestive marks are deemed to be inherently distinctive, and receive registration without proof of secondary meaning. A.J. Canfield co. v. Concord Beverage Co., 629 F.Supp. 200 (E.D. Pa. 1985).

VOTIVO’s MANDARINE products are composed of various natural and synthetic compounds that are suggestive of the aroma of mandarin. Lee Decl. ¶11, Jones Decl. ¶6. The perception of scent and aroma is subjective and differs from person to person. Jones Decl. ¶7. Scent and aromas can directly evoke strong emotions, moods and feelings in individuals. Jones Decl. ¶5. VOTIVO’s MANDARINE products stimulate these moods and feelings through the use of fantasy fragrances. Lee Decl. ¶11. VOTIVO’s products are designed and promoted with a strong emphasis on the suggestive or conceptual “It reminds me of...,” rather than on the definitive “It is” olfactory association. Jones Decl. ¶7. Thus, the MANDARINE mark is suggestive of the aroma of mandarin and thus an inherently distinctive mark.

However, even assuming hypothetically that mandarin fruit actually was a component ingredient in the products, it would not follow that the mark MANDARINE is generic. A term that is a generic name of an ingredient is not necessarily a generic name of a product containing that ingredient. *See Haydon Switch & Instrument, Inc. v. Rexnord, Inc.*, 4 U.S.P.Q.2d 1510, 1987 WL 26062 (D. Conn. 1987) (PLANETGEAR held not to be a generic name for electric counters that have planetary gears as a component part – “Because the planetary gears in plaintiff’s counters are a component or ingredient of the product, not the product itself, the PLANETGEAR mark is in no sense generic”); *Schmidt v. Honeysweet Hams, Inc.*, 656 F.Supp. 92 (N.D.Ga. 1986) (HONEY BAKED HAM held not generic as applied to hams, even though plaintiff’s hams were smoked and glazed with a spice compound which included honey as one of the component ingredients); *Eagle Snacks, Inc. v. Nabisco Brands, Inc.* 625 F.Supp. 571 (D.N.J. 1985) (HONEY ROAST held not generic as applied to peanuts, even though the peanuts were roasted and honey was one of the component ingredients).

4. **The use of the MANDARINE mark in connection with a wide variety of products makes a finding of genericness impossible in this case.**

MANDARINE is already the subject of two valid existing federal registrations for use in connection with “*candles and tapers*,” and “*skin soap, scented body spray, scented room spray, and incense*.” Edmiston Decl. Exhs. 18 – 19. Opposer’s claim that MANDARINE is generic is illogical given the use of the mark for such varied products. The fact that MANDARINE has been used on a variety of products

contradicts the term "generic," since it has been used on more than one "genus" of products. See McCarthy on Trademarks, § 12:23; Telechron, Inc. v. Telicon Corp., 198 F.2d 903, 94 U.S.P.Q. 363 (3d Cir. 1952) (TELECHRON held non-generic as used on a wide variety of dissimilar electric time-pieces). See In re Automatic Radio Mfg. Co., 404 F.2d 1391, 160 U.S.P.Q. 233 (C.C.P.A. 1969) (AUTOMATIC RADIO used on air conditioners, ignition systems, and antennas as well as on radios);

#### **IV. RELIEF REQUESTED**

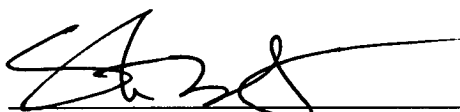
WHEREFORE, VOTIVO requests that Mine Design's motion for summary judgment be denied; and, that VOTIVO's cross-motion for summary judgment be granted and Mine Design's Opposition be dismissed with prejudice.

DATED: March 12, 2008.

Respectfully Submitted,

INVICTA LAW GROUP, PLLC

By



Mark V. Jordan, WSBA No. 18461

Steven W. Edmiston, WSBA No. 17136

Charles P. Siner, WSBA No. 21427

Heather Morado, WSBA No. 35135

1000 Second Ave., Suite 3310

Seattle, Washington 98104-1019

Attorneys for Applicant

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113 Fed.Appx. 403, 2004 WL 2370605 (C.A.Fed.)

**(Cite as: 113 Fed.Appx. 403)**

**H**

Stoller v. Ponce

C.A.Fed.,2004.

This case was not selected for publication in the Federal Reporter.NOTE: This disposition is nonprecedential.

United States Court of Appeals,Federal Circuit.

Leo STOLLER, Appellant,

v.

Karen PONCE, Appellee.

**No. 04-1305.**

Oct. 8, 2004.

**Background:**

Purported trademark holder sought judicial review of dismissal by Trademark Trial and Appeal Board of his opposition to trademark application.

**Holdings:** The Court of Appeals held that:

- (1) excluding purported trademark holder's affidavits was not abuse of discretion;
- (2) exclusion of purported trademark holder's deposition transcripts and attached affidavits was not abuse of discretion;
- (3) purported trademark holder lacked standing to oppose trademark registration; and
- (4)

Board's refusal to consider purported trademark holder's evidence of standing and subsequent dismissal of his opposition did no deny his due process rights.

Affirmed.

West Headnotes

**[1] Trademarks 382T ⚔ 1309**

382T Trademarks

382TVII Registration

382TVII(B) Proceedings Concerning Federal Registration

382Tk1306 Evidence

382Tk1309 k. Admissibility. Most Cited Cases

(Formerly 382k223 Trade Regulation)

Excluding affidavits offered by purported trademark holder in support of his opposition to trademark application was not at discretion by Trademark Trial and Appeal Board, given its finding that applicant had not agreed to submission of witness testimony in form of affidavits, as required by rule. 37 C.F.R. § 2.123(b).

**[2] Trademarks 382T ⚔ 1309**

382T Trademarks

382TVII Registration

382TVII(B) Proceedings Concerning Federal Registration

382Tk1306 Evidence

382Tk1309 k. Admissibility. Most Cited Cases

(Formerly 382k223 Trade Regulation)

Exclusion of purported trademark holder's deposition transcripts and attached affidavits in proceeding on his opposition to trademark application was not abuse of discretion by Trademark Trial and Appeal Board, which found that holder was attempting to circumvent rule prohibiting affidavit submission absent written stipulation by both parties when he attached affidavits as exhibits to deposition transcripts, and that depositions were not recorded by court officer in accordance with rule. 37 C.F.R. § 2.123(e)(2).

**[3] Trademarks 382T ⚔ 1294**

382T Trademarks

382TVII Registration

382TVII(B) Proceedings Concerning Federal Registration

382Tk1290 Opposition

382Tk1294 k. Persons Entitled to Oppose; Standing; Parties. Most Cited Cases

(Formerly 382k217 Trade Regulation)

Purported trademark holder lacked standing to oppose trademark registration when he submitted no admissible evidence demonstrating that he had real interest in registration of applicant's trademark.

**[4] Constitutional Law 92 ⚔ 4304**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)12 Trade or Business

92k4300 Intellectual Property

92k4304 k. Trademarks and Trade Names. Most Cited Cases

(Formerly 92k296(1))

**Trademarks 382T 1296**382T Trademarks382TVII Registration382TVII(B) Proceedings Concerning Federal Registration382Tk1290 Opposition382Tk1296 k. Conduct of Proceedings; Hearing and Determination. Most Cited Cases

(Formerly 382k220 Trade Regulation)

Purported trademark holder received complete hearing of his opposition to applicant's registration of trademark in accord with governing rules, which included having adequate notice of rules and full opportunity to argue admissibility of his evidence in his reply brief and at hearing before Trademark Trial and Appeal Board, and therefore Board's refusal to consider purported trademark holder's evidence of standing and subsequent dismissal of his opposition did not deny his due process rights. U.S.C.A. Const. Amend. 5.

\*404 Before MAYER, Chief Judge, RADER, and SCHALL, Circuit Judges.

PER CURIAM.

\*\*1 Leo Stoller seeks review of the Trademark Trial and Appeal Board's (Board's) dismissal of his opposition to Karen Ponce's application for the trademark STEALTH SHELF. *Stoller v. Ponce*, Opp'n No. 91,120,339 (TTAB Jan. 22, 2004). In particular, Mr. Stoller appeals the Board's decision to deny admission of evidence of his standing. In addition, Mr. Stoller appeals the Board's finding that he was without standing as a violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Because the Board did not abuse its discretion in excluding Mr. Stoller's evidence and there is no procedural due process violation, this court *affirms*.

#### BACKGROUND

Ms. Ponce applied to the Trademark Office to register the trademark STEALTH SHELF for a spacing device used for stereo electronics equipment. Mr. Stoller, who purports to have registered several trademarks with the word "stealth" in them for similar goods, filed an opposition to Ms. Ponce's application with the Trademark Office. Mr. Stoller argued primarily that Ms. Ponce's use of the STEALTH SHELF mark was likely to cause confusion with the use of his marks. The matter was assigned to a panel of three administrative trademark judges.

During discovery, Mr. Stoller scheduled depositions for himself and another individual.\*405 Each deposition consisted solely of confirming that each deponent had signed the affidavit before him and the deponent's desire to submit the affidavit in support of the opposition. Mr. Stoller then attached each affidavit as an exhibit to each deposition transcript. Mr. Stoller submitted the deposition transcripts and affidavits to the Board as attachments to his trial brief. At oral argument, Ms. Ponce objected to admission of the deposition transcripts and attached affidavits into evidence.

In response to Ms. Ponce's objection, the Board declined to admit Mr. Stoller's evidence of standing on two grounds. First, the Board found that the attached affidavits were inadmissible because Ms. Ponce had not agreed that affidavit evidence could be submitted in the opposition proceeding. In addition, the Board found that the deposition transcripts were inadmissible under

Trademark	Rule	2.123(e)(2)
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because neither deposition had been recorded by an officer of the court. Upon the exclusion of both the deposition transcripts and the attached affidavits, the Board found that Mr. Stoller had submitted no other evidence demonstrating that he had standing to oppose Ms. Ponce's trademark application. The Board, therefore, dismissed Mr. Stoller's opposition without reaching the issue whether there was a likelihood of confusion between STEALTH SHELF and the marks registered by Mr. Stoller.

Mr. Stoller appeals the Board's dismissal to this court.

## ANALYSIS

The Board's evidentiary findings will stand absent an abuse of discretion. See Chen v. Bouchard, 347 F.3d 1299, 1307 (Fed.Cir.2003) (citing Kearns v. Chrysler Corp., 32 F.3d 1541, 1547 (Fed.Cir.1994) ). Further, this court reviews the Board's conclusions of law without deference. In re Int'l Flavors & Fragrances Inc., 183 F.3d 1361, 1365 (Fed.Cir.1999) .

**\*\*2**

[1]

Mr. Stoller argues that the Board erred in holding his affidavits inadmissible for failure to comply with the requirements of Trademark Rule 2.123(b) . 37 C.F.R. § 2.123(b) (2003) . This rule allows for the submission of witness testimony in the form of affidavits only "by written agreement of the parties." Board found that Ms. Ponce had not agreed to either submission and Mr. Stoller cannot contest this finding. Accordingly, the Board did not abuse its discretion in excluding the affidavits from consideration.

[2]

Alternatively, Mr. Stoller contends that the affidavits are admissible as exhibits to the depositions. The Board, however, determined that Mr. Stoller merely sought to circumvent the rule prohibiting affidavit submission absent written stipulation by both parties through use of these depositions. Moreover, the Board found that the depositions were not taken in the required format. In pertinent part, Trademark Rule 2.123(e)(2) requires that depositions "shall be taken in answer to questions, with the questions and answers recorded ... by the officer, or by some other person ... in the presence of the officer." 37 C.F.R. § 2.123(e)(2) . The Board determined that neither deposition was recorded by a court officer. It was, therefore, fully within the Board's discretion to exclude Mr. Stoller's non-compliant depositions transcripts and the attached affidavits.

[3]

In order for Mr. Stoller to have standing to oppose the registration of a trademark, he must demonstrate that he has a "real interest" in the outcome of the registration proceeding and is "more than a mere intermeddler." Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed.Cir.1999) . The type of interest demonstrated \*406 need not be monetary, but some interest must be shown in order to justify the Board's consideration of an opposition. See id. at 1097; see also Int'l Nutrition Co. v. Horphag Research, 220 F.3d 1325, 1330 (Fed.Cir.2000) (holding that no proprietary interest in the trademark at issue is necessary for standing to oppose the registration of that mark). Mr. Stoller, however, submitted admissible evidence that could demonstrate that he has a real interest in the registration of the STEALTH SHELF trademark. In the absence of any evidence demonstrating Mr. Stoller's interest, the Board did not err in finding that he failed to establish his standing to oppose Ms. Ponce's registration.

[4]

Finally, Mr. Stoller argues that the Board's refusal to consider his evidence of standing and subsequent dismissal of his opposition is a denial of his due process rights. This procedural due process claim is belied, however, by the fact that he received a complete hearing of his opposition in accordance with the Rules of Practice in Trademark Cases. See In re Int'l Flavors, 183 F.3d at 1365 . Moreover, Mr. Stoller had adequate notice of the Trademark Rules because not only are they available to the public, he admits that he has "engaged in the policing and protecting of [his] valuable trademarks before the [Board] for over 25 years." Appellant's Brief at 2. In addition, Mr. Stoller was given a full opportunity to argue the admissibility of his evidence in both his reply brief and at the hearing before the Board. See id.

**\*\*3**

Mr. Stoller also argues that he was not given a fair hearing because one of the administrative trademark judges on his opposition panel was prejudiced against him. Mr. Stoller, however, provides no evidence or rationale in support of his belief that administrative judge was biased. In sum, Mr. Stoller's due process arguments are unavailing.

CONCLUSION

Accordingly, the decision of the Board is *affirmed*.

C.A.Fed.,2004.

Stoller v. Ponce

113 Fed.Appx. 403, 2004 WL 2370605 (C.A.Fed.)

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(Cite as: 92 Fed.Appx. 789)

Central Mfg. v. Surgical Navigation Technologies, Inc.  
C.A.Fed.,2004.

This case was not selected for publication in the Federal Reporter.NOTE: Pursuant to Fed.Cir.R. 47.6, this order is not citable as precedent. It is public record.Please use FIND to look at the applicable circuit court rule before citing this opinion. Federal Circuit Rule 47.6. (FIND CTAF Rule 47.6.)

United States Court of Appeals,Federal Circuit.

CENTRAL MFG., Appellant,

v.

SURGICAL NAVIGATION TECHNOLOGIES, INC., Appellee.

**No. 03-1414.**

March 17, 2004.

**Background:** Owner of number of "STEALTH" trademark registrations and applications appealed decision of the United States Patent and Trademark Office, Trademark Trial and Appeal Board dismissing its opposition to intent-to-use (ITU) trademark application for use of mark "STEALTHVIEW."

**Holdings:** The Court of Appeals, Schall , Circuit Judge, held that:

(1) Board did not abuse its discretion in denying owner's third discovery request;

(2) owner conceded applicant's allegations and arguments by failing to respond to its motion for summary judgment; and

(3) Board did not abuse its discretion when it denied owner's motion to suspend proceedings while its petition to Director

was pending.

Affirmed.

West Headnotes

**[1] Trademarks 382T 1305**

382T Trademarks

382TVII Registration

382TVII(B) Proceedings Concerning Federal Registration

382Tk1305 k. Discovery. Most Cited Cases

(Formerly 382k211.1)

Trademark Trial and Appeal Board did not abuse its discretion in denying trademark owner's third discovery request in response to applicant's motion for summary judgment, where request merely repeated interrogatories, document requests, and requests for admissions from owner's second request, which Board had already denied, and owner continued to pursue previously rejected arguments. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A .

**[2] Trademarks 382T 1296**

382T Trademarks

382TVII Registration

382TVII(B) Proceedings Concerning Federal Registration

382Tk1290 Opposition

382Tk1296 k. Conduct of Proceedings; Hearing and Determination. Most Cited Cases

(Formerly 382k220)

Opponent to trademark application was deemed to have conceded applicant's allegations and arguments by failing to respond to applicant's motion for summary judgment. 37 C.F.R. § 2.127(a) .

**[3] Trademarks 382T 1296**

382T Trademarks

382TVII Registration

382TVII(B) Proceedings Concerning Federal Registration

382Tk1290 Opposition

382Tk1296 k. Conduct of Proceedings; Hearing and Determination. Most Cited Cases

(Formerly 382k220)

Trademark Trial and Appeal Board did not abuse its discretion when it denied trademark owner's motion to suspend proceedings while its petition to Director was pending, where Board explicitly informed owner that, if it chose to file petition or appeal with Director, Board could decide summary judgment motion while petition or appeal was pending.

\*790 Before SCHALL , DYK , and PROST , Circuit Judges.

DECISION

SCHALL , Circuit Judge.

**\*\*1** Central Mfg. ("Central") appeals the decision of the United States Patent and Trademark Office, Trademark Trial and Appeal Board ("Board" or "TTAB") that dismissed with prejudice Central's opposition to an intent-to-use ("ITU") trademark application filed by Surgical Navigation Technologies, Inc. ("SNT"). *Cent. Mfg. v. Surgical Navigation Techs., Inc.*, Opp'n No. 117,480 (TTAB Jan. 13, 2003). We *affirm*.

## DISCUSSION

### I.

SNT filed an ITU application for use of the mark "STEALTHVIEW." According to the application, the goods and services associated with STEALTHVIEW comprise a computer system "primarily of hardware and software for using medical scanning information for surgical planning for use in image guided surgery." Application Ser. No. 75/577,215 ("the '215 application"). Central filed a Notice of Opposition to the '215 application based on its ownership of a number of "STEALTH" trademark registrations and applications. In addition, it subsequently served multiple, broad discovery requests on SNT. SNT responded with a combined motion to dismiss and to stay discovery, which the Board treated as a motion for summary judgment.

In response to SNT's motion to dismiss, Central filed a motion for discovery pursuant to Federal Rules of Civil Procedure, Rule 56(f) ("Rule 56(f)"). The Board denied the motion as overbroad and sanctioned Central under Federal Rules of Civil Procedure, Rule 11 for falsely stating that its discovery request was "very tailored" to SNT's motion to dismiss. Twice more, Central attempted to conform its discovery requests to Rule 56(f) and the Board's instructions. At the same time, it twice sought leave to amend its Notice of Opposition. In due course, the Board denied Central's motions to amend its Notice of Opposition, and denied with prejudice its third motion for discovery under **\*791**Rule 56(f). The Board then gave Central thirty days to respond to SNT's summary judgment motion, informing Central that "[i]f opposer chooses to file a petition or appeal with the Director, the Board may decide the summary judgment motion while the petition or appeal is pending." *Cent. Mfg. v. Surgical Navigation Techs., Inc.*, Opp'n No. 117,480 (TTAB Nov. 14, 2002). Central petitioned the Director regarding the Board's denial of its second motion to amend the Notice of Opposition. However, it thereafter failed to respond to the summary judgment motion, as directed by the Board. For that reason, on January 13, 2003, the Board ruled that the facts of the case, as alleged by SNT, were deemed conceded. Accordingly, the Board dismissed with prejudice Central's opposition. Central now appeals the Board's decision. We have jurisdiction pursuant to 15 U.S.C. § 1071(a) (2000).

### II.

Central makes two main arguments on appeal. First, it contends that the Board abused its discretion in denying its Rule 56(f) discovery requests. Second, it asserts that the Board abused its discretion in denying its motion to suspend proceedings and that it erred in dismissing its opposition while its petition to the Director was pending.

**\*\*2** We review the Board's rulings on discovery issues and procedural matters under the abuse of discretion standard. Spezzaferro v. FAA, 807 F.2d 169, 173 (Fed.Cir.1986). We will not disturb the Board's factual findings unless they are arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence. In re Boston Beer Co. L.P., 198 F.3d 1370, 1373 (Fed.Cir.1999). Finally, we review the Board's conclusions of law *de novo*. In re Thrifty Inc., 274 F.3d 1349, 1351 (Fed.Cir.2001).

## A.

[1] With respect to the first issue Central raises on appeal, we see no abuse of discretion in the Board's denial of Central's third Rule 56(f) discovery request. Rule 56(f) allows a party to request limited discovery where it is unable to respond to a pending motion for summary judgment because it lacks necessary facts. Each discovery request under Rule 56(f) must be adequately supported by a showing of need by the movant. Keebler Co. v. Murray Bakery Prods., 866 F.2d 1386, 1389 (Fed.Cir.1989) .

The Board found that Central's third Rule 56(f) discovery request merely repeated interrogatories, document requests, and requests for admissions from Central's second request, which the Board had already denied. Cent. Mfg. v. Surgical Navigation Techs., Inc., Opp'n No. 117,480 (TTAB Aug. 19, 2002). The Board also found that Central continued to pursue previously rejected arguments and "completely ignored [a previous] Board order, where the Board clearly stated that 'opposer's interrogatory nos. 1-8.1 are improper.' " *Id.* The Board noted that Central "included certain of those interrogatories, verbatim, in its third amended motion for discovery." *Id.* We see no abuse of discretion in the Board's denial of Central's third Rule 56(f) discovery request.

## B.

Turning to Central's second argument on appeal, we see no error in the Board's dismissal of Central's opposition. To successfully oppose SNT's motion for summary judgment, Central needed only to aver, by affidavit, facts sufficient to establish a *prima facie* case with respect to any one of the number of reasons an opposer may use to challenge a trademark application.\*792 Indeed, the allegations in Central's Notice of Opposition comprised a veritable laundry list of such reasons. Thus Central alleged: likelihood of confusion; fraud; that SNT's typed drawing was not a substantially exact representation; that the description of the goods in SNT's application was indefinite; that STEALTHVIEW is merely descriptive or deceptively misdescriptive; and that SNT has no bona fide intent to use the mark. *Notice of Opp'n*, ¶¶ 10-20. *See generally*, Practitioner's Trademark Manual of Examining Procedure (3rd ed.2002). The fundamental problem with Central's Notice of Opposition, however, is that it is entirely devoid of specific supporting facts.

SNT pointed out in its motion to dismiss that Central "makes no factual allegations in its numbered averments, other than perhaps inferences from its listed registrations, that it sells or has sold any goods which overlap with SNT's application in any way." Additionally, SNT noted that the STEALTH field is crowded and that registrations in the field must therefore be narrowly interpreted. Jet Tours v. Mark Travel Corp., 1999 WL 20927, 1999 TTAB LEXIS 14, \*10 (1999) ; *see Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 58 C.C.P.A. 735, 432 F.2d 1400 (CCPA 1970) . SNT also noted that Central's STEALTH mark is not famous as a matter of law. *See S Indus. v. Diamond Multimedia Sys., Inc.*, 991 F.Supp. 1012, 1021 (N.D.Ill.1998) . SNT argued that, under these circumstances, no claim of likelihood of confusion between Central's STEALTH mark and the challenged STEALTHVIEW mark could be supported. Accordingly, SNT asserted that Central could not be damaged by SNT's registration of STEALTHVIEW and therefore lacked standing to oppose under 15 U.S.C. § 1063(a) . *See Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed.Cir.1999) (holding that an opposer must have a reasonable basis for his belief of damage).

\*\*3 [2] SNT's allegations and arguments were properly deemed conceded by the Board when Central failed to respond to SNT's motion for summary judgment. *See 37 C.F.R. § 2.127(a)* ("When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded."); Chesebrough Pond's, Inc. v. Faberge, Inc., 618 F.2d 776, 780 (CCPA 1980) (affirming the Board's decision to treat a motion for summary judgment as conceded when the non-moving party failed to file a brief in opposition). Hence, as a matter of law, SNT was entitled to judgment. The Board therefore properly dismissed

Central's opposition.

[3] Central's contention that the Board abused its discretion when it denied Central's motion to suspend proceedings while its petition to the Director was pending is without merit. The Board explicitly informed Central that, "[i]f opposer chooses to file a petition or appeal with the Director, the Board may decide the summary judgment motion while the petition or appeal is pending." *Cent. Mfg. v. Surgical Navigation Techs., Inc.*, Opp'n No. 117,480 (TTAB Nov. 14, 2002). A decision of the Board controlling its own docket is entitled to substantial deference, and generally will not be overturned. *In re Boston Beer*, 198 F.3d at 1373 . We see no reason to disturb the Board's decision on this point.

For the foregoing reasons, the Board's decision dismissing Central's opposition to SNT's ITU application for the mark STEALTHVIEW is affirmed.

C.A.Fed.,2004.

Central Mfg. v. Surgical Navigation Technologies, Inc.

92 Fed.Appx. 789, 2004 WL 542194 (C.A.Fed.)

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240 Fed.Appx. 865

Page 1

240 Fed.Appx. 865, 2007 WL 2032069 (C.A.Fed.)

(Cite as: 240 Fed.Appx. 865)

**H**

McDermott v. San Francisco Women's Motorcycle Contingent  
C.A.Fed.,2007.

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Federal Circuit Rule 32.1 and Federal Circuit Local Rule 32.1. (Find CTAF Rule 32.1)

United States Court of Appeals, Federal Circuit.

Michael J. McDERMOTT, Appellant,

v.

SAN FRANCISCO WOMEN'S MOTORCYCLE CONTINGENT, Appellee.

**No. 07-1101.**

July 11, 2007.

**Background:**

Plaintiff filed opposition to motorcycle group's application to register the trademark "Dykes on Bikes." The Trademark Trial : Appeal Board, 2006 WL 2682345, dismissed the opposition. Plaintiff appealed.

**Holding:**

The Court of Appeals held that plaintiff failed to establish reasonable belief that he would be damaged by trademark.

Affirmed.

West Headnotes

**Trademarks 382T 1294**

382T Trademarks

382TVII Registration382TVII(B) Proceedings Concerning Federal Registration382Tk1290 Opposition382Tk1294 k. Persons Entitled to Oppose; Standing; Parties. Most Cited Cases

Plaintiff failed to establish a reasonable belief that he would be damaged by motorcycle group's registration of trademark "Dykes on Bikes," for purposes of establishing standing to bring opposition to registration on grounds that mark was disparaging and comprised of scandalous and immoral material; plaintiff, being a man, did not possess a trait or characteristic that was clearly directly implicated in the proposed mark, and plaintiff had not alleged that his belief was shared by others. Lanham Act, § 2(a), 15 U.S.C.A. § 1052(a).

**Trademarks 382T 1800**382T Trademarks382TXI Trademarks and Trade Names Adjudicated382Tk1800 k. Alphabetical Listing. Most Cited Cases

DYKES ON BIKES.

**\*866** Appealed from United States Patent and Trademark Office, Trademark Trial and Appeal Board.

Michael J. McDermott, of Dublin, CA, pro se.

Gregory S. Gilchrist, Townsend and Townsend and Crew LLP, of San Francisco, CA, for appellee. With him on the brief were Gia L. Cincone and Raquel Pacheco. Of counsel on the brief were Michael O. Crain, Oliver-Crain, P.C., of Athens, GA, and Brooke Oliver, of San Francisco, CA.

Before MAYER and LOURIE, Circuit Judges, and LINARES, District Judge. FN\*

FN\* Honorable Jose L. Linares  
, District Judge, United States District Court for the District of New Jersey, sitting by designation.

PER CURIAM.

## DECISION

**\*\*1** Michael J. McDermott ("McDermott") appeals from the decision of the United States Patent and Trademark Office Trademark Trial and Appeal Board (the "Board") dismissing for lack of standing his opposition to the San Francisco Women's Motorcycle Contingent's ("SFWMC") application to register the trademark DYKES ON BIKES ("the mark"). *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 U.S.P.Q.2d 1212 (T.T.A.B.2006). Because the Board did not err in its dismissal of McDermott's opposition, we affirm.

## BACKGROUND

On July 31, 2003, SFWMC applied to register the mark for education and entertainment services. Initially, registration was refused under 15 U.S.C. § 1052(a) FN1 on the basis that the word "dyke" was disparaging to lesbians. Upon consideration of additional evidence following a remand from the Board, the examiner approved the trademark application for publication, and it was published on January 4, 2006. McDermott filed his Notice of Opposition to registration on February 15, 2006. On April 5, 2006, SFWMC filed a motion to dismiss the opposition pursuant to **\*867** Federal Rule of Civil Procedure 12(b)(6) for lack of standing and failure to state a legal basis for the opposition.

FN1. Under 15 U.S.C. § 1052(a), no trademark shall be refused registration on account of its nature unless it "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or

dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute....”

In its September 13, 2006 decision, the Board granted SFWMC's motion to dismiss, finding that McDermott lacked the requisite standing to oppose registration of the mark. Relying on this court's decision in *Ritchie v. Simpson*, 170 F.3d 1092 (Fed.Cir.1999), the Board found that McDermott had sufficiently pleaded a “real interest,” but had failed to allege facts that would show he had a “reasonable” basis for his belief that he would be damaged by the registration.

McDermott timely appealed to this court, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(4)(B).

## DISCUSSION

We review the Board's legal determinations *de novo* and its factual findings for substantial evidence. *In re Bose*, 476 F.3d 1331, 1334 (Fed.Cir.2007). Standing is a question of law that this court reviews *de novo*. *Isr. Bio-Eng'g Project v. Amgen, Inc.*, 475 F.3d 1256, 1262-63 (Fed.Cir.2007).

On appeal, McDermott argues that the Board misapplied this court's precedent and thereby denied him due process. SFWMC responds that McDermott failed to identify any reasonable basis for believing that registration of the mark would be harmful to him or others.

The narrow question before us is whether McDermott has standing to oppose registration of the mark, and we find no error in Board's determination that McDermott lacked the requisite standing. As noted by the Board, McDermott has basically made two claims under 15 U.S.C. 1052(a). First, he has alleged it is disparaging based on the inclusion of the term “dykes” (the disparagement claim). Second, he has alleged that it is comprised of scandalous and immoral material because the mark in full is associated with a pattern of illegal activity by the group applying for registration of the mark (the scandalous claim). McDermott lacks standing to assert either claim.

\*\*2 As we explained in *Ritchie*, an opposer of registration of a mark must have both a real interest in the proceedings and a reasonable basis for a belief that he would be damaged by its registration. *Id.* at 1095. The Board did find that McDermott had sufficiently pleaded a real interest, and SFWMC does not challenge that finding. Thus, McDermott's standing, or lack thereof, rests on whether his pleading establishes a reasonable basis for his belief that he would be damaged by registration.

In *Ritchie*, we stated that “one method of establishing the reasonableness of belief of damage for purposes of standing is for the opposer to allege he possesses a trait or characteristic that is clearly and directly implicated in the proposed mark.” *Id.* at 1098. The Board found that McDermott, being a man, was not so “implicated” by the mark, and we agree that the registration of the proposed mark would have no “implications” for a man.

“[A]nother means that may be used to demonstrate the reasonableness of the opposer's belief of damage is to allege that others share the same belief of harm from the proposed trademark” as demonstrated through surveys, petitions, or affidavits from persons with a real interest in the trademark. *Id.*

The Board found, and we agree, that McDermott's opposition papers contain no allegations that his belief is shared by others and no reference to supporting evidence demonstrating such a shared belief. No other basis has been shown to provide McDermott, a man, with sufficient standing to enable him to oppose registration of the proposed mark.

\*868 We have considered the additional arguments by the parties and find them to be without merit or moot. We therefore affirm the Board's decision dismissing for lack of standing McDermott's opposition to registration of the mark.

C.A.Fed.,2007.

McDermott v. San Francisco Women's Motorcycle Contingent

240 Fed.Appx. 865, 2007 WL 2032069 (C.A.Fed.)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 76/613881  
For the Mark MANDARINE  
Published in the Official Gazette JUNE 5, 2007

MINE DESIGN D/B/A/ OF AMAL FLORES  
(U.S.),

Opposers,

v.

VOTIVO, LTD., a Washington corporation,

Applicant,

VOTIVO, LLC, a South Carolina Limited  
Liability Company,

Defendant

APPLICANT'S AND DEFENDANT'S CROSS-  
MOTION FOR SUMMARY JUDGMENT

Opposition No. 91178747

**CROSS-MOTION FOR SUMMARY JUDGMENT**

Come now Applicant VOTIVO, Ltd., and Defendant VOTIVO, LLC (hereafter, collectively, "VOTIVO"), pursuant to Fed. R. Civ. P. 56(c) and make this Cross-Motion for Summary Judgment. VOTIVO respectfully requests that Opposer Mine Design D/B/A Amal Flores's Opposition be dismissed. Opposer has no standing to oppose the subject mark MANDARINE because, among other grounds, it has been permanently enjoined from using MANDARINE as a mark in connection with any home or personal care products. Further, the Opposition is precluded based upon the doctrine of res judicata, and more specifically, the doctrines of claim and issue preclusion, arising from prior federal court lawsuits between the parties.

### **LEGAL AUTHORITY**

The legal authority for this Cross-Motion for Summary Judgment is set forth in VOTIVO'S Memorandum in Opposition to Mine Design's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, filed contemporaneously herewith.

### **EVIDENCE**

The evidentiary support for VOTIVO's Cross-Motion for Summary Judgment includes (1) the Declaration of Steven W. Edmiston in Opposition to Mine Design's Motion for Summary Judgment and in Support of Cross-Motion, and exhibits thereto, (including the Declarations of Edgar Lee, Harris Jones, and Donald Buckley) and (2) the Declaration of Robert E. Caldwell, Jr., in Opposition to Mine Design's Motion for Summary Judgment and in Support of Cross-Motion; and (3) the pleadings and records otherwise on file herein.

### **RELIEF REQUESTED**

VOTIVO requests that its Cross-Motion for Summary Judgment be granted and Mine Design's Opposition be dismissed with prejudice.

DATED: March 12, 2008.

Respectfully Submitted,

INVICTA LAW GROUP, PLLC

By 

Mark V. Jordan, WSBA No. 18461

Steven W. Edmiston, WSBA No. 17136

Charlie P. Siner, WSBA No. 21427

Heather Morado, WSBA No. 35132

1000 Second Ave., Suite 3310

Seattle, Washington 98104

Attorney for Applicant

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 76/613881  
For the Mark MANDARINE  
Published in the Official Gazette JUNE 5, 2007

MINE DESIGN D/B/A/ OF AMAL FLORES  
(U.S.),

Opposer,

v.

VOTIVO, LTD., a Washington corporation,

Applicant,

VOTIVO, LLC, a South Carolina Limited  
Liability Company,

Defendant

DECLARATION OF ROBERT E. CALDWELL, JR.  
(1) IN OPPOSITION TO OPPOSER'S MOTION  
FOR SUMMARY JUDGMENT AND (2) IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY  
JUDGMENT

Opposition No. 91178747

Robert E. Caldwell, Jr., declares and states as follows:

1. I am Executive Vice President of VOTIVO, LLC. I have personal knowledge of the following facts, and am competent to testify thereto.
2. I make this declaration in support of VOTIVO, Ltd.'s, and VOTIVO, LLC's, Opposition to Mine Design's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment.
3. VOTIVO, LLC is in the business of designing, manufacturing and wholesaling aromatic products for home and personal care, including candles, tapers,

skin soap, scented body spray, scented room spray, incense, bath salts, and hand lotion, under a wide variety of trademarks, including Mandarin (collectively, the "Marks").

4. VOTIVO, LLC is a limited liability company based in Spartanburg, South Carolina.

5. On September 28, 2007, VOTIVO, LLC, and VOTIVO, Ltd., a Washington corporation, executed an Intellectual Property, Inventory, and other Physical Property Asset Purchase and Transfer Agreement ("Asset Agreement") wherein VOTIVO, LLC acquired, among other things, all rights for the VOTIVO, Ltd. products at issue in this matter, including the trademark registrations and other intellectual property rights for United States P.T.O. Registration Nos. 2720908 (candles and tapers) and 2728815 (skin soap, scented body spray, scented room spray, and incense), and Serial No. 76/613881 (bath salts and hand lotion), all for the mark "Mandarine."

6. To my knowledge, the business and operations of VOTIVO, LLC, including the product development and design process, product marketing, products sales, manufacturing, operations, and ongoing efforts to manage and protect intellectual property, especially in connection with home and personal care products bearing the mark "Mandarine," are the substantially the same as the business and operations of VOTIVO, Ltd. as of September 27, 2007:

7. I have reviewed the May 5, 2005 Declaration of Edgar Lee, former President of VOTIVO, Ltd., that is attached to the Declaration of Steven W.

Edmiston, VOTIVO's counsel in this matter. During the due diligence process that

occurred by and between VOTIVO, LLC and VOTIVO, Ltd. prior to the September 28, 2007 Asset Agreement, and subsequent thereto, I have also reviewed the history of VOTIVO, Ltd.'s product development and design process, product marketing, products sales, manufacturing, operations, and intellectual property management and protection. Based upon my own personal knowledge and the extensive due diligence process, I agree with the statements set forth in Mr. Lee's 2005 Declaration, and believe that to the extent they pertain to VOTIVO, LLC, home and personal care products bearing the mark "Mandarine," including bath salts and hand lotion, they remain true today.

8. To this day, VOTIVO, LLC maintains an aggressive intellectual property protection policy and vigorously defends its Marks against unlawful infringement by third parties.

9. To this day, VOTIVO LLC sells its aromatic products, including bath salts and hand lotions, in the United States through a network of approximately 6,659 retailers such as Saks Fifth Avenue, Neiman Marcus and Nordstrom's, as well as home furnishing boutiques, specialty gift stores and retail websites.

10. VOTIVO utilizes a hired-sales force of 28 persons through its affiliate, Grace Direct, Inc. to cover the U.S.A.

11. For the 2008 fiscal year VOTIVO has budgeted \$314,700 for product development and marketing.

12. The Marks are promoted in a permanent showroom in Atlanta as well as at 10 trade shows in Chicago, Dallas, Los Angeles and New York with a budget of \$192,008 for this activity.

13. Thousands of competing manufacturers and retailers in the aromatic products and gift industries attend the trade shows.

14. The determination of an aromatic home or personal care product name is a highly creative process that is not always dictated by the precise fragrance ingredients of the product. Instead, the product scent name is usually inspired by emotions, moods, fantasies, or feelings evoked by a particular product aroma.

15. The aromatic products manufactured and sold by VOTIVO, including bath salts and hand lotions, are a mixture of various synthetic and natural compounds. These compounds contain top notes, middle notes, and base notes which are layered together to suggest certain moods, thoughts, and/or feelings. The interpretation of a particular product aroma is highly subjective and different people often have different interpretations of the same product aroma.

16. Except for this opposition case, to my knowledge, as long as VOTIVO, LLC or VOTIVO, Ltd. has been selling aromatic products, neither company has ever received a single claim that the product name for a bath salt or hand lotion was a generic term for the actual product. Nor has VOTIVO, LLC ever received any information from any consumer or competitor suggesting that the term "Mandarine" referred to "bath salts" as a category of goods, or that it referred to "hand lotion" as a category of goods.

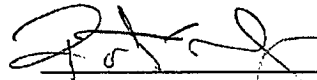
17. Similarly, except for this opposition case, to my knowledge no consumer or competitor has ever maintained with VOTIVO, LLC that the term "Mandarine" referred to "scented bath salts" or "scented hand lotion" as a category of goods.

18. I am unaware of any survey, dictionary definition, trade journal, newspaper or other publication using the term "Mandarine" (Mandarin) for any purpose other than in reference to a Chinese language dialect, or a fruit.

19. To the best of VOTIVO's knowledge, there is no 100% Mandarin bath salt or hand lotion product on the market.

I declare under penalty of perjury under the laws of the state of South Carolina that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED at Spartanburg, South Carolina this 12<sup>th</sup> day of March 2008.

  
\_\_\_\_\_  
Robert E. Caldwell, Jr., Declarant

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 76/613881

For the Mark MANDARINE

Published in the Official Gazette JUNE 5, 2007

MINE DESIGN D/B/A/ OF AMAL FLORES  
(U.S.),

Opposers,

v.

VOTIVO, LTD., a Washington corporation,

Applicant,

VOTIVO, LLC, a South Carolina Limited  
Liability Company,

Defendant

DECLARATION OF STEVE EDMISTON (1) IN  
OPPOSITION TO OPPOSER'S MOTION FOR  
SUMMARY JUDGMENT AND (2) IN SUPPORT OF  
CROSS-MOTION FOR SUMMARY JUDGMENT

Opposition No. 91178747

Steven W. Edmiston, declares and states as follows:

1. I am counsel of record for the Applicant/Defendants. I have personal knowledge of the following facts, and am competent to testify thereto.

2. I make this declaration in support of VOTIVO, Ltd.'s, and VOTIVO, LLC's Opposition to Mine Design's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment.

3. Attached as Exhibit No. 1 is a true and correct copy of the VOTIVO, Ltd. Summons and Complaint in *VOTIVO, Ltd. v. Mine Design, U.S.*

Dist. Ct. Cause No. CV 03-6017-DT (Central Dist., CA 2005) (this matter hereafter referred to as "Mine Design I") filed August 22, 2003.

4. Attached as Exhibit No. 2 is a true and correct copy of Mine Design's Answer and Affirmative Defenses of Defendant Mine Design to Plaintiff's Complaint, filed July 14, 2004, in Mine Design I.

5. Attached as Exhibit No. 3 is a true and correct copy of Findings of Fact and Conclusions of Law entered November 8, 2005, in Mine Design I.

6. Attached as Exhibit No. 4 is a true and correct copy of the Permanent Injunction entered November 8, 2005, against Amal Flores, DBA Mine Design, and its attorneys, in Mine Design I.

7. Attached as Exhibit No. 5 is a true and correct copy of the Final Judgment against Amal Flores, DBA Mine Design, entered November 8, 2005, in Mine Design I.

8. Attached as Exhibit No. 6 is a true and correct copy of the Mine Design's F.R.C.P. 59(e) Motion to Alter or Amend Final Judgment, filed November 22, 2005, in Mine Design I.

9. Attached as Exhibit No. 7 is a true and correct copy of the Order and Opinion Denying Mine Design's F.R.C.P. 59(e) Motion to Alter or Amend Final Judgment, entered December 27, 2005, in Mine Design I.

10. Attached as Exhibit No. 8 is a true and correct copy of Mine Design's Notice of Appeal to the United States Court of Appeals for the Ninth Circuit ("Mine Design I Appeal"), Case No. 06-55147.

11. Attached as Exhibit No. 9 is a true and correct copy of VOTIVO, Ltd.'s Verified Complaint for trademark infringement and other causes of action, filed in U.S. District Court for the, Case No. CV-05- 2942-DT (Central Dist. of California) (this matter hereafter referred to as "Mine Design II").

12. Attached as Exhibit No. 10 is a true and correct copy of Mine Design's First Amended Answer, Affirmative Defenses, and Counterclaims, filed September 19, 2005, in Mine Design II.

13. Attached as Exhibit No. 11 is a true and correct copy of the May 5, 2006, Settlement Agreement between VOTIVO Ltd. and Amal Flores, d/b/a Mine Design.

14. Attached as Exhibit No. 12 is a true and correct copy of the Dismissal Agreement Pursuant to F.R.A.P. 42(b), dismissing Mine Design's Notice of Appeal in Mine Design I.

15. Attached as Exhibit No. 13 is a true and correct copy of the Stipulation for Dismissal with Prejudice and Without Costs, entered in Mine Design II.

16. In both Mine Design I and II, Amal Flores, DBA Mine Design, was represented by its present counsel, Carlos Candeloro.

17. Attached as Exhibit No. 14 are true and correct copies of excerpts of the Intellectual Property, Inventory, and other Physical Property Asset Purchase and Transfer Agreement, the Assignment of Trademark Interests, and Assignment

of Intent-Based Trademark Interests, all executed on September 28, 2007, by and between VOTIVO, Ltd., and VOTIVO, LLC.

18. Attached as Exhibit No. 15 is a true and correct copy of the February 7, 2005 Declaration of Edgar Lee, submitted in *VOTIVO Ltd. v. Tyler Candle Co.*, No. CVO3-2661P (W.D. Washington). Mr. Lee was the President of VOTIVO, Ltd. at the time of the execution of the Declaration.

19. Attached as Exhibit No. 16 is a true and correct copy of the February 4, 2005 Declaration of Harris Jones, submitted in *VOTIVO Ltd. v. Tyler Candle Co.*, No. CVO3-2661P (W.D. Washington).

20. Attached as Exhibit No. 17 is a true and correct copy of the February 4, 2005 Declaration of Donald O. Buckley, submitted in *VOTIVO Ltd. v. Tyler Candle Co.*, No. CVO3-2661P (W.D. Washington).

21. Attached as Exhibit No. 18 is a true and correct copy of U.S. Patent and Trademark Office Certificate of Registration for Mandarine, No. 2,728,815.

22. Attached as Exhibit No. 19 is a true and correct copy of U.S. Patent and Trademark Office Certificate of Registration for Mandarine, No. 2,720,908.

23. Attached as Exhibit No. 20 is a true and correct copy of the September 22, 2004, VOTIVO, Ltd. Trademark Application for the Principal Register based upon Intended Use for Mandarine for Bath Salts and Hand Lotion, Serial No. 76613881.

24. Attached as Exhibit No. 21 is a true and correct copy of the May 3, 2005, Examiner's Amendment/Priority Action, stating among other things that VOTIVO may seek registration under the Trademark Act, Section 2(f), by claiming acquired distinctiveness through ownership of U.S. Registration 2728815 (for Mandarin).

25. Attached as Exhibit No. 22 is a true and correct copy of VOTIVO's counsel's letter to the Examiner's Amendment/Priority Action, providing the statement:

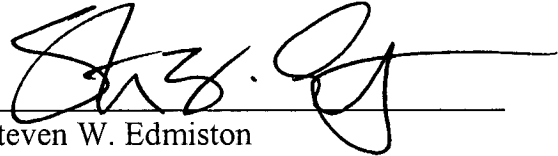
The mark has become distinctive of the goods as evidenced by the ownership of U.S. Registration No. 2,728,815 on the Principal Register for the same mark for related goods or services.

26. Attached as Exhibit 23 is a true and correct copy of the U.S.P.T.O. Notice of Publication with respect to "Mandarine" for bath salts and hand lotion issued on June 5, 2007.

27. Attached as Exhibit 24 are true and correct black and white printouts of pages from retail internet websites wherein VOTIVO products with the mark MANDARINE are marketed and sold to VOTIVO's customers. The copies in Exhibit 24 were printed on March 10-11, 2008. Each copy bears the hyper-text transfer protocol ("http:") address or uniform resource locator ("url").

I declare under penalty of perjury under the laws of the state of Washington  
that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED at Seattle, Washington this 12<sup>th</sup> day of March 2008.

  
Steven W. Edmiston

DECLARATION OF STEVE EDMISTON (1) IN  
OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY  
JUDGMENT AND (2) IN SUPPORT OF CROSS-MOTION  
FOR SUMMARY JUDGMENT - 6

# EXHIBIT 1

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Votivo, Ltd., a Washington corporation,

PLAINTIFF(S)

v.

Mine Design, a business entity of unknown form,

DEFENDANT(S).

CASE NUMBER

• 03-6017 DT (EX)

SUMMONS

TO: THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to file with this court and serve upon plaintiff's attorney  
Gregory P. Goonan, whose address is:

The Affinity Law Group  
600 West Broadway, Suite 400  
San Diego, CA 92101  
tel: 619-702-4335  
fax: 619-515-1197

an answer to the ☒ complaint ☐ \_\_\_\_\_ amended complaint ☐ counterclaim ☐ cross-claim  
which is herewith served upon you within 20 days after service of this Summons upon you, exclusive  
of the day of service. If you fail to do so, judgement by default will be taken against you for the relief  
demanded in the complaint.

Clerk, U.S. District Court

Dated: 08/22/03

By: Terry R. Baker

Deputy Clerk

(Seal of the Court)

ORIGINAL

1 Gregory P. Goonan (Cal. Bar #119821)  
2 **The Affinity Law Group APC**  
3 600 West Broadway, Suite 400  
4 San Diego, CA 92101  
5 Tel: 619-702-4335  
6 Fax: 619-515-1197

7  
8 Attorneys for Plaintiff  
9 Votivo, Ltd.

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

Votivo, Ltd, a Washington corporation,

Plaintiff,

vs.

Mine Design, a business entity of unknown  
form,

Defendant.

Case No.

**COMPLAINT FOR (1) TRADEMARK  
INFRINGEMENT; (2) VIOLATION OF  
LANHAM ACT SECTION 43(a); (3)  
VIOLATION OF CALIFORNIA  
BUSINESS AND PROFESSIONS CODE  
SECTION 17200; (4) COMMON LAW  
UNFAIR COMPETITION; AND (5)  
COMMON LAW TRADEMARK  
INFRINGEMENT**

**JURY TRIAL DEMANDED**

Plaintiff Votivo, Ltd. ("Votivo") alleges as follows for its complaint:

**INTRODUCTION**

1. Votivo is one of the country's leading manufacturers and distributors of home decor products, gift products and personal care products. Among the many products sold by Votivo are candles, burning sticks and incense, scented room sprays, skin soaps, and scented body sprays. Since at least as early as 1999, Votivo has used a variety of distinctive trademarks to advertise and promote its products.

COPY

2. Votivo's family of trademarks is distinctive when applied to Votivo's products. Because of the excellent sales and extensive promotion of Votivo's products, Votivo's family of trademarks have become well known to consumers and others in the personal care, home decor and gift industries as identifying unique and desirable products of the highest quality that originate with Votivo.

3. Consequently, Votivo's trademarks are very important and valuable business assets of Votivo, and represent significant business goodwill.

4. Among the distinctive and valuable trademarks owned and used by Votivo are the trademarks "Red Currant" and "Soku Lime." Votivo owns United States Trademark Registration Nos. 2,720,906 and 2,720, 907 for the Red Currant mark and United States Trademark Registration Nos. 2,717,256 and 2,717, 257 for the Soku Lime mark. Votivo's Red Currant trademark and Soku Lime trademark are sometimes collectively referred to herein as the "Votivo Trademarks."

5. The foregoing federal trademark registrations are sometimes referred to collectively herein as the "Votivo Trademark Registration." The Votivo Trademark Registrations protect the Red Currant mark and the Soku Lime mark in connection with the following goods: candles, tapers, skin soap, scented body spray, scented room spray and incense.

6. Defendant Mine Design ("Defendant") has been advertising, marketing, and selling candles and, on information and belief, other home decor products, gift products, and/or personal care products using the terms Red Currant and Soku Lime and/or other terms that are confusingly similar to the Votivo Trademarks. In doing so, Defendant has infringed, and continues to infringe, Votivo's trademark rights.

7. Votivo brings this action to secure relief under federal and California law. Votivo seeks (1) a temporary, preliminary and permanent injunction prohibiting Defendant from further infringement of the Votivo Trademarks; (2) an order requiring the seizure and impoundment of all infringing products in Defendant's possession, custody or control pending completion of this action; and (3) money damages for Defendant's past and continuing infringement of the Votivo Trademarks.

1  
2 **JURISDICTION AND VENUE**

3 8. This Court has jurisdiction over this matter pursuant to (i) 28 U.S.C. § 1331 (action  
4 arising under the laws of the United States); (ii) 28 U.S.C. § 1338(a) (action arising under  
5 trademark law); (iii) 28 U.S.C. § 1338(b) (claims for unfair competition joined with claims under  
6 the trademark law); (iv) 15 U.S.C. § 1121(a) (action arising under the Lanham Act); (v) and  
7 principles of pendant jurisdiction.

8 9. Venue is proper in this district pursuant to 28 U.S.C. § 1391 (b,c).

9 **THE PARTIES**

10 10. Votivo is a corporation organized and existing under the laws of the State of  
11 Washington with its principal place of business in Seattle, Washington. Votivo is the owner of the  
12 trademark rights in the Votivo Trademarks including trademark rights pursuant to the Votivo  
13 Trademark Registrations and common law trademark rights. Votivo markets and sells home decor  
14 products, gift products and personal care products using the Votivo Trademarks and other valuable  
15 and distinctive trademarks.

16 11. Votivo is informed and believes and on that basis alleges that Defendant is a  
17 business organization of unknown form with its principal place of business in Beverly Hills,  
18 California. Votivo is informed and believes and on that basis alleges that Defendant sells  
19 housewares, home accessories, and novelty and gift items primarily at gift shows throughout the  
20 United States.

21 **FACTUAL BACKGROUND**

22 A. Votivo's Trademark Rights.

23 12. Votivo began using the Votivo Trademarks in association with the promotion and  
24 sale of candles, tapers, skin soap, scented body spray, scented room spray and incense since at  
25 least as early as 1999, has used the Votivo Trademarks in such manner at all times relevant to the  
26 allegations of this complaint, and continues to use the Votivo Trademarks in such manner on a  
27 continuous basis to the present.  
28

1           13.     Votivo has used the Votivo Trademarks extensively in print advertisements,  
2 brochures and other printed marketing materials, and on the Internet. Votivo also has sold a  
3 significant amount of products to distributors and consumers using the Votivo Trademarks.

4           14.     As a result of Votivo's extensive promotion and use of the Votivo Trademarks, and  
5 the substantial amount of sales accomplished by Votivo of products bearing the Votivo  
6 Trademarks, the Votivo Trademarks have become well-known in the home decor products  
7 industry, the gift products industry and the personal care products industry as signifying high,  
8 quality, unique and desirable products that originate with Votivo.

9           15.     Through the use of the Votivo Trademarks, Votivo has generated substantial  
10 business goodwill for and from the Votivo Trademarks, and the Votivo Trademarks have become  
11 important and valuable business assets for Votivo.

12           16.     On May 20, 2003, Votivo obtained United States Trademark Registration No.  
13 2,717,256 to protect the Soku Lime mark for use in association with skin soap, scented body  
14 spray, scented room spray and incense. United States Trademark Registration No. 2,717,256 has  
15 been valid and subsisting at all relevant times. A true and correct copy of the registration  
16 certificate for United States Trademark Registration No. 2,717,256 is attached hereto as Exhibit 1.

17           17.     On May 20, 2003, Votivo obtained United States Trademark Registration No.  
18 2,717,257 to protect the Soku Lime mark for use in association with candles and tapers. United  
19 States Trademark Registration No. 2,717,257 has been valid and subsisting at all relevant times.  
20 A true and correct copy of the registration certificate for United States Trademark Registration No.  
21 2,717,257 is attached hereto as Exhibit 2.

22           18.     On June 3, 2003, Votivo obtained United States Trademark Registration No.  
23 2,720,906 to protect the Red Currant mark for use in association with skin soap, scented body  
24 spray, scented room spray and incense. United States Trademark Registration No. 2,720,906 has  
25 been valid and subsisting at all relevant times. A true and correct copy of the registration  
26 certificate for United States Trademark Registration No. 2,720,906 is attached hereto as Exhibit 3.

27           19.     On June 3, 2003, Votivo obtained United States Trademark Registration No.  
28 2,720,907 to protect the Red Currant mark for use in association with candles and tapers. United

1 States Trademark Registration No. 2,720,907 has been valid and subsisting at all relevant times.  
2 A true and correct copy of the registration certificate for United States Trademark Registration No.  
3 2,720,907 is attached hereto as Exhibit 4.

4 B. Defendant's Wrongful Acts.

5 20. From August 10, 2003 through August 14, 2003, representatives of Votivo attended  
6 the New York International Gift Show (the "New York Show") in New York City. During the  
7 New York Show, Votivo discovered for the first time that Defendant was infringing the Votivo  
8 Trademarks by selling scented candles and other products using the Votivo Trademarks and by  
9 using the Votivo Trademarks to market, advertise, and sell Defendant's products in a manner that  
10 was likely to cause confusion among the public.

11 21. On August 11, 2003, Votivo's counsel sent a cease and desist letter to Defendant  
12 notifying Defendant about Votivo's trademark rights and explaining to Defendant that it was  
13 infringing Votivo's trademark rights by promoting and selling products using the Votivo  
14 Trademarks. By its August 11 letter, counsel demanded that Defendant immediately cease and  
15 desist from any further use of the Votivo Trademarks and any further marketing or sale of  
16 products in association with the Votivo Trademarks.

17 22. A true and correct copy of counsel's August 11, 2003 cease and desist letter is  
18 attached as Exhibit 5.

19 23. Defendant never responded to the August 11, 2003 letter and did not confirm in  
20 writing as demanded by the August 11 letter that Defendant would cease and desist from any  
21 further sale of products in association with the Votivo Trademarks and from any further  
22 infringement of the Votivo Trademarks.

23 24. On information and belief, Defendant continues to infringe the Votivo Trademarks  
24 as alleged herein.

25 **FIRST CLAIM FOR RELIEF**

26 (Federal Trademark Infringement)

27 25. Votivo realleges and incorporates by this reference each and every allegation  
28 contained in paragraphs 1 through 24 of this Complaint as though set forth in full herein.

1           26.     This claim for relief is an action for federal trademark infringement pursuant to the  
2 federal Trademark Act, 15 U.S.C. § 1114 et seq.

3           27.     As alleged herein, Votivo has four valid and subsisting federal registrations for the  
4 Votivo Trademarks. Votivo has marketed, advertised and sold candles, tapers, skin soap, scented  
5 body spray, scented room spray, incense and other home decor products, gift products and  
6 personal care products since at least as early as 1999 using the Votivo Trademarks.

7           28.     As alleged herein, Votivo is informed and believes and on that basis alleges that  
8 Defendant has marketed, advertised and sold, and continues to market, advertise and sell, candles  
9 and other home decor products, gift products and personal care products using the Votivo  
10 Trademarks.

11           29.     Defendant's activities and wrongful use of the Votivo Trademarks as alleged herein  
12 have caused, and are likely to continue to cause, confusion in the minds of public to the detriment  
13 of Votivo.

14           30.     Defendant's use of the Votivo Trademarks as alleged herein, and marketing,  
15 advertising and sale of products using the Votivo Trademarks, was done without the knowledge,  
16 consent or permission of Votivo and continues without the consent or permission of Votivo.

17           31.     Defendant has violated the trademark rights of Votivo under the Trademark Act,  
18 thereby giving rise to a cause of action under 15 U.S.C. § 1114.

19           32.     Votivo will be irreparably harmed unless Defendant is temporarily, immediately  
20 and permanently enjoined from any further use of the Votivo Trademarks and any further  
21 marketing, advertising or sale of products using the Votivo Trademarks.

22           33.     Votivo has no adequate remedy at law and serious damage to its trademark rights  
23 will result unless Defendant's wrongful use of the Votivo Trademarks is enjoined by the court.

24           34.     Votivo also is entitled to an order requiring the impoundment of all infringing  
25 products and materials pending the trial of this matter, and the destruction of all infringing  
26 products and materials following trial.

27           35.     Defendant has continued to use the Votivo Trademarks notwithstanding that it has  
28 actual knowledge of Votivo's superior trademark rights as alleged herein. Defendant's

1 infringement of the Votivo Trademarks accordingly constitutes intentional, willful, knowing and  
2 deliberate trademark infringement.

3 36. Defendant's infringement of the Votivo Trademarks as alleged herein has caused,  
4 and will continue to cause, Votivo to suffer damages in an amount unknown at this time and has  
5 caused, and will continue to cause, Defendant to gain revenues and profit in an amount unknown  
6 at this time. Pursuant to 15 U.S.C. § 1117(a), Votivo is entitled to an award of monetary damages  
7 in an amount equal to the losses suffered by Votivo and the revenues and/or profits gained by  
8 Defendant, which damages should be augmented as provided by 15 U.S.C. §1117(a).

9 37. Pursuant to 15 U.S.C. § 1117(a), any monetary damages awarded to Votivo should  
10 be trebled.

11 38. Pursuant to 15 U.S.C. § 1117(a), Votivo is entitled to an award of attorneys fees  
12 and costs of suit.

### 13 SECOND CLAIM FOR RELIEF

14 (Violation of Lanham Act Section 43(a))

15 39. Votivo realleges and incorporates by this reference each and every allegation  
16 contained in paragraphs 1 through 38 of this Complaint as though set forth in full herein.

17 40. This claim for relief is for violation of Lanham Act section 43(a), 15 U.S.C. §  
18 1125(a).

19 41. The actions of Defendant as alleged herein constitute unfair competition and false  
20 advertising in violation of Lanham Act section 43(a).

21 42. Votivo will be irreparably harmed unless Defendant is temporarily, immediately  
22 and permanently enjoined from any further use of the Votivo Trademarks and any further  
23 marketing, advertising or sale of products using the Votivo Trademarks.

24 43. Votivo has no adequate remedy at law and serious damage to its trademark rights  
25 will result unless Defendant's wrongful use of the Votivo Trademarks is enjoined by the court.

26 44. Votivo also is entitled to an order requiring the impoundment of all infringing  
27 products and materials pending the trial of this matter, and the destruction of all infringing  
28 products and materials following trial.

1           45.     The actions of Defendant as alleged herein constitute intentional, willful, knowing  
2 and deliberate unfair competition and false advertising pursuant to Lanham Act Section 43(a).

3           46.     Defendant's acts of unfair competition and false advertising in violation of Lanham  
4 Act Section 43(a) as alleged herein have caused, and will continue to cause, Votivo to suffer  
5 damages in an amount unknown at this time and have caused, and will continue to cause,  
6 Defendant to gain revenues and profit in an amount unknown at this time. Pursuant to 15 U.S.C. §  
7 1117(a), Votivo is entitled to an award of monetary damages in an amount equal to the losses  
8 suffered by Votivo and the revenues and/or profits gained by Defendant, which damages should be  
9 augmented as provided by 15 U.S.C. §1117(a).

10          47.     Pursuant to 15 U.S.C. § 1117(a), any monetary damages awarded to Votivo should  
11 be trebled.

12          48.     Pursuant to 15 U.S.C. § 1117(a), Votivo is entitled to an award of attorneys fees  
13 and costs of suit.

### 14                               **THIRD CLAIM FOR RELIEF**

15                               (Violation of California B&P Code Section 17200 et seq.)

16          49.     Votivo realleges and incorporates by this reference each and every allegation  
17 contained in paragraphs 1 through 48 of this Complaint as though set forth in full herein.

18          50.     This claim for relief is for unfair competition and false advertising in violation of  
19 California Business and Professions Code section 17200 et seq.

20          51.     The actions of Defendant as alleged herein constitute unfair competition and false  
21 advertising in violation of California Business and Professions Code section 17200 et seq.

22          52.     Votivo will be irreparably harmed unless Defendant is enjoined from any further  
23 use of the Votivo Trademarks, from any further marketing, advertising and sale of products using  
24 the Votivo Trademarks, and from any further acts of unfair competition and false advertising  
25 relating to the Votivo Trademarks.

26          53.     Votivo has no adequate remedy at law and serious damage to its rights will result  
27 unless the Defendant's wrongful use of the Votivo Trademarks is enjoined by the court.  
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1           54.     The actions of Defendant as alleged herein constitute intentional, willful, knowing  
2 and deliberate unfair competition and false advertising.

3           55.     Defendant's acts of unfair competition and false advertising have caused the  
4 Defendant to gain revenues and profit in an amount unknown at this time. Pursuant to California  
5 Business & Professions Code section 17203, Votivo is entitled to a disgorgement in an amount  
6 equal to the revenues and/or profits gained by Defendant.

7                               **FOURTH CLAIM FOR RELIEF**

8                               (Common Law Trademark Infringement)

9           56.     Votivo realleges and incorporates by this reference each and every allegation  
10 contained in paragraphs 1 through 55 of this Complaint as though set forth in full herein.

11           57.     This claim for relief is for common law trademark infringement.

12           58.     The actions of Defendant as alleged herein constitute common law trademark  
13 infringement.

14           59.     Votivo will be irreparably harmed unless Defendant is temporarily, immediately  
15 and permanently enjoined from any further use of the Votivo Trademarks and any further  
16 marketing, advertising or sale of products using the Votivo Trademarks.

17           60.     Votivo has no adequate remedy at law and serious damage to its trademark rights  
18 will result unless Defendant's wrongful use of the Votivo Trademarks is enjoined by the court.

19           61.     Votivo also is entitled to an order requiring the impoundment of all infringing  
20 products and materials pending the trial of this matter, and the destruction of all infringing  
21 products and materials following trial.

22           62.     Defendant has continued to use the Votivo Trademarks notwithstanding that it has  
23 actual knowledge of Votivo's superior trademark rights as alleged herein. Defendant's  
24 infringement of the Votivo Trademarks accordingly constitutes intentional, willful, knowing and  
25 deliberate trademark infringement.

26           63.     Defendant's infringement of the Votivo Trademarks as alleged herein has caused,  
27 and will continue to cause, Votivo to suffer damages in an amount unknown at this time and has  
28 caused, and will continue to cause, Defendant to gain revenues and profit in an amount unknown

1 at this time. Votivo is entitled to an award of monetary damages in an amount equal to the losses  
2 suffered by Votivo and the revenues and/or profits gained by Defendant.

3 64. Defendant committed the acts of trademark infringement alleged herein  
4 intentionally, deliberately, maliciously, with intent to injure and oppress Votivo, and in conscious  
5 disregard of the rights of Votivo. Votivo accordingly is entitled to an award of punitive and  
6 exemplary damages in an amount sufficient to punish and deter Defendant and make it an example  
7 to others.

### 8 FIFTH CLAIM FOR RELIEF

9 (Common Law Unfair Competition)

10 65. Votivo realleges and incorporates by this reference each and every allegation  
11 contained in paragraphs 1 through 64 of this Complaint as though set forth in full herein.

12 66. This claim for relief is for common law unfair competition.

13 67. The actions of Defendant as alleged herein constitute common law unfair  
14 competition.

15 68. Votivo will be irreparably harmed unless Defendant is temporarily, immediately  
16 and permanently enjoined from any further use of the Votivo Trademarks, any further marketing,  
17 advertising or sale of products using the Votivo Trademarks, and any further acts of unfair  
18 competition and false advertising.

19 69. Votivo has no adequate remedy at law and serious damage to its rights will result  
20 unless Defendant's wrongful use of the Votivo Trademarks is enjoined by the court.

21 70. Votivo also is entitled to an order requiring the impoundment of all infringing  
22 products and materials pending the trial of this matter, and the destruction of all infringing  
23 products and materials following trial.

24 71. Defendant's acts of unfair competition and false advertising as alleged herein have  
25 caused, and will continue to cause, Votivo to suffer damages in an amount unknown at this time  
26 and have caused, and will continue to cause, Defendant to gain revenues and profit in an amount  
27 unknown at this time. Votivo is entitled to an award of monetary damages in an amount equal to  
28 the losses suffered by Votivo and the revenues and/or profits gained by Defendant.

72. Defendant committed the acts of unfair competition and false advertising alleged herein intentionally, deliberately, maliciously, with intent to injure and oppress Votivo, and in conscious disregard of the rights of Votivo. Votivo accordingly is entitled to an award of punitive and exemplary damages in an amount sufficient to punish and deter Defendant and make it an example to others.

### **PRAYER FOR RELIEF**

WHEREFORE, Votivo prays for relief against Defendant as follows:

1. For a temporary, preliminary and permanent injunction restraining and enjoining Defendant, and its agents, servants, employees, and all others in active concert or participation with it, as follows:

a) From further using the Votivo Trademarks, and any packaging and advertising and promotional materials containing the Votivo Trademarks, in any way or manner whatsoever;

b) From further infringing Votivo's trademark rights;

c) From further advertising, promoting, distributing, offering for sale, and/or selling, any products using the Votivo Trademarks or any mark confusingly similar with the Votivo Trademarks.

d) From further acts of false advertising and unfair competition as alleged herein.

2. For an order requiring the impoundment of all infringing products and materials pending the trial of this matter, and the destruction of all infringing products and materials following trial.

3. For an award of damages suffered by Votivo, plus any revenues or profits earned by Defendant, as a result of Defendant's trademark infringement, unfair competition and false advertising, in an amount to be proven at trial.

4. For an award of augmented and treble damages as alleged herein.

5. For an award of punitive and exemplary damages in an amount to be proven at trial but sufficient to punish and deter the defendants.

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6. For an award of attorneys' fees and litigation expenses to the maximum extent allowed by law.

7. For costs of suit incurred herein.

8. For such other and further relief as the court may deem just and proper.

DATED: August 21, 2003

THE AFFINITY LAW GROUP APC

By: \_\_\_\_\_

Gregory P. Goonan  
Attorneys for Plaintiff  
Votivo Ltd.

**DEMAND FOR JURY TRIAL**

Votivo hereby demands a trial by jury.

DATED: August 21, 2003

THE AFFINITY LAW GROUP APC

By: 

Gregory P. Goonan  
Attorneys for Plaintiff  
Votivo Ltd.

1           6.     For an award of attorneys' fees and litigation expenses to the maximum  
2 allowed by law.

3           7.     For costs of suit incurred herein.

4           8.     For such other and further relief as the court may deem just and proper.

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8 DATED: August 21, 2003

THE AFFINITY LAW GROUP APC

9

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By: \_\_\_\_\_

Gregory P. Goonan  
Attorneys for Plaintiff  
Votivo Ltd.

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DEMAND FOR JURY TRIAL

Votivo hereby demands a trial by jury.

DATED: August 21, 2003

THE AFFINITY LAW GROUP APC

By: \_\_\_\_\_

Gregory P. Goonan  
Attorneys for Plaintiff  
Votivo Ltd.

Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51 and 52

United States Patent and Trademark Office

Reg. No. 2,717,256

Registered May 20, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**SOKU LIME**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "LIME", APART FROM THE MARK  
AS SHOWN.

FOR: SKIN SOAP, SCENTED BODY SPRAY,  
SCENTED ROOM SPRAY, AND INCENSE, IN  
CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

SER. NO. 76-394,450, FILED 4-11-2002.

FIRST USE 8-19-1999; IN COMMERCE 8-19-1999.

ALICIA COLLINS, EXAMINING ATTORNEY

Int. Cl.: 4

Prior U.S. Cls.: 1, 6 and 15

United States Patent and Trademark Office

Reg. No. 2,717,257

Registered May 20, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**SOKU LIME**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "LIME", APART FROM THE MARK  
AS SHOWN.

FOR: CANDLES AND TAPERS, IN CLASS 4 (U.S.  
CLS. 1, 6 AND 15).

SER. NO. 76-394,451, FILED 4-11-2002.

FIRST USE 8-19-1999; IN COMMERCE 8-19-1999.

ALICIA COLLINS, EXAMINING ATTORNEY

Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51 and 52

Reg. No. 2,720,906

United States Patent and Trademark Office

Registered June 3, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**RED CURRANT**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

FIRST USE 1-2-1997; IN COMMERCE 1-2-1997.

SEC. 2(F).

FOR: SKIN SOAP, SCENTED BODY SPRAY,  
SCENTED ROOM SPRAY, AND INCENSE, IN  
CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

SER. NO. 76-394,462, FILED 4-11-2002.

ALICIA COLLINS, EXAMINING ATTORNEY

Int. Cl.: 4

Prior U.S. Cls.: 1, 6 and 15

Reg. No. 2,720,907

United States Patent and Trademark Office

Registered June 3, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**RED CURRANT**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

SEC. 2(F).

FOR: CANDLES AND TAPERS, IN CLASS 4 (U.S.  
CLS. 1, 6 AND 15).

SER. NO. 76-394,463. FILED 4-11-2002.

FIRST USE 1-2-1997; IN COMMERCE 1-2-1997.

ALICIA COLLINS, EXAMINING ATTORNEY

1000 Second Avenue, Suite 3310  
Seattle, WA 98104-1019  
(206) 903-6364  
(206) 903-6365 fax  
www.invicta-law.com

August 11, 2003

Mark V. Jordan  
Email: [mjordan@invictalaw.com](mailto:mjordan@invictalaw.com)

**VIA DELIVERY:**

MINE DESIGN

c/o Ms. Melissa Dagodag

c/o Mr. Amal Flores

Jacob K. Javits Convention Center

655 West 34<sup>th</sup> Street

New York, NY 10001

**VIA CERTIFIED MAIL: 70010360000395284099**

Mine Design

P.O. Box 16775

Beverly Hills, CA 90209

Re: Trademark Infringement

Dear Sir and Madam:

We are counsel for VOTIVO, LTD ("VOTIVO"). VOTIVO is the exclusive owner of the following federal trademark registrations: SOKU LIME bearing U.S. Registration Nos. 2717256 and 2717257; and RED CURRANT bearing U.S. Registration Nos. 2720906 and 2720907 (collectively, the "Marks"). Copies of the registrations from the US Patent & Trademark Office are enclosed.

Our client recently attended the 2003, New York International Gift Market and was distressed to find numerous examples at the Mine Design booth wherein your company patently infringed upon the Marks. The Lanham Act gives VOTIVO certain intellectual property rights and remedies for any infringement of the Marks. Accordingly, VOTIVO demands that your company immediately cease and desist from all further use of the Marks.

VOTIVO is prepared to enforce its exclusive rights to the Marks to the fullest extent of the law. Its remedies include, but are not limited to, immediate and permanent injunctive relief, recovery of your company's profits, recovery of VOTIVO's lost profits, treble damages and attorneys' fees.

If you wish to resolve this matter without resorting to litigation, your company must immediately cease and desist from any further infringing use of the Marks. VOTIVO further requires that you immediately comply in writing with the following demands:

**Invicta**

Mine Design  
August 11, 2003  
Page 2

1. Immediately terminate all infringing or unauthorized use of the Marks together with all similar marks, including an acknowledgment that all items constituting infringement or use of the Marks have been removed from the Mine Design brochure, catalog, and all show rooms and exhibitions;
2. Immediately account for and forfeit all copies of the infringing works to counsel for VOTIVO; and
3. Provide a declaration or affidavit, signed under penalty of perjury by the principles, or an officer or director of Mine Design on behalf of all its respective parents, subsidiaries, divisions, affiliates and officers stating that all such entities and individuals will immediately, and for all time, cease using VOTIVO's Marks in any advertisement, promotion, sale or other commercial exploitation of its goods.

Unless these demands are complied with immediately and unless we receive the written documentation demanded above by August 15, 2003, VOTIVO will assume your company intends its willful disregard in violation of VOTIVO's rights, and VOTIVO will pursue whatever action or remedies it deems appropriate to protect its rights.

Very truly yours,

INVICTA LAW GROUP, PLLC

*Mark V. Jordan*

Mark V. Jordan

MVJ:zm  
Encls.  
cc: VOTIVO, LTD.

VOTL 9 cbl 10104

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only: No Insurance Coverage Provided)	
<b>OFFICIAL USE</b>	
Postage	\$ .37
Certified Fee	2.30
Return Receipt Fee (Endorsement Required)	1.75
Restricted Delivery Fee (Endorsement Required)	
<b>Total Postage &amp; Fees</b>	<b>\$ 4.42</b>
Postmark Here	
Sent To Mine Design	
Street, Apt. No., or PO Box No. P.O. Box 16775	
City, State, ZIP+4 Beverly Hills, CA 90209	

# **EXHIBIT 2**

1 Amal Flores d/b/a  
2 MINEDESIGN  
3 Post Office Box 16775  
4 Beverly Hills, California 90209  
5 Telephone: (800) 973 0555  
6 Facsimile: (310) 914-3205

7 Defendant *In Pro Per*

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11 VOTIVO, INC.,

12 Plaintiff,

13 v.

14 Mine Design, a business entity of  
15 unknown form.

16 Defendant.

Case No. CV-03-6017 DT (Ex)

**ANSWER AND AFFIRMATIVE  
DEFENSES OF DEFENDANT MINE  
DESIGN TO PLAINTIFF'S  
COMPLAINT**

Fact Discovery Cutoff: Not yet set  
Pretrial Conference: Not yet set  
Trial Date: Not yet set

17  
18 Defendant MINE DESIGN, a sole proprietorship (hereinafter, "MINE"), for  
19 itself and no other defendant, answers the Complaint for Trademark Infringement,  
20 Unfair Competition and False Advertising (hereinafter, the "Complaint") filed by  
21 VOTIVO, LTD. (hereinafter, "Plaintiff") in this action and denies all allegations not  
22 specifically admitted and states as follows:

23 1. MINE is without sufficient knowledge or information to form a belief as  
24 to the truth of the allegations contained in Paragraph 1 of the Complaint and, on that  
25 basis, denies them.

26 2. MINE is without sufficient knowledge or information to form a belief as  
27 to the truth of the allegations contained in Paragraph 2 of the Complaint and, on that  
28 basis, denies them.

1           3.       MINE is without sufficient knowledge or information to form a belief as  
2 to the truth of the allegations contained in Paragraph 3 of the Complaint and, on that  
3 basis, denies them.

4           4.       MINE is without sufficient knowledge or information to form a belief as  
5 to the truth of the allegations contained in Paragraph 4 of the Complaint and, on that  
6 basis, denies them.

7           5.       MINE is without sufficient knowledge or information to form a belief as  
8 to the truth of the allegations contained in Paragraph 5 of the Complaint and, on that  
9 basis, denies them.

10          6.       MINE denies the allegations contained in Paragraph 6 of the Complaint.

11          7.       Because the allegations of Paragraph 7 of the Complaint contain only  
12 conclusions of law, MINE is not required to provide a response, and therefore, denies  
13 the same.

14          8.       Because the allegations of Paragraph 8 of the Complaint contain only  
15 conclusions of law, MINE is not required to provide a response, and therefore, denies  
16 the same.

17          9.       Because the allegations of Paragraph 9 of the Complaint contain only  
18 conclusions of law, MINE is not required to provide a response, and therefore, denies  
19 the same.

20          10.       MINE is without sufficient knowledge or information to form a belief as  
21 to the truth of the allegations contained in Paragraph 10 of the Complaint and, on that  
22 basis, denies them.

23          11.       MINE denies the allegations contained in Paragraph 11 of the Complaint.

24          12.       MINE is without sufficient knowledge or information to form a belief as  
25 to the truth of the allegations contained in Paragraph 12 of the Complaint and, on that  
26 basis, denies them.

27          13.       MINE is without sufficient knowledge or information to form a belief as  
28 to the truth of the allegations contained in Paragraph 13 of the Complaint and, on that  
basis, denies them.

1       14.     MINE is without sufficient knowledge or information to form a belief as  
2 to the truth of the allegations contained in Paragraph 14 of the Complaint and, on that  
3 basis, denies them.

4       15.     MINE is without sufficient knowledge or information to form a belief as  
5 to the truth of the allegations contained in Paragraph 15 of the Complaint and, on that  
6 basis, denies them.

7       16.     MINE admits only that U.S. Trademark Registration No. 2,717, 256  
8 attached as Exhibit 1 to the Complaint on its face appears to have been issued in  
9 Plaintiff's name for the purported mark SOKU LIME for "skin soap, scented body  
10 spray, scented room spray, and incense." MINE is without sufficient knowledge or  
11 information to form a belief as to the truth of the remaining allegations contained in  
12 Paragraph 16 of the Complaint and, on that basis, denies them.

13       17.     MINE admits only that U.S. Trademark Registration No. 2,717, 257  
14 attached as Exhibit 2 to the Complaint on its face appears to have been issued in  
15 Plaintiff's name for the purported mark SOKU LIME for "candles and tapers." MINE  
16 is without sufficient knowledge or information to form a belief as to the truth of the  
17 remaining allegations contained in Paragraph 17 of the Complaint and, on that basis,  
18 denies them.

19       18.     MINE admits only that U.S. Trademark Registration No. 2,720,906  
20 attached as Exhibit 3 to the Complaint on its face appears to have been issued in  
21 Plaintiff's name for the purported mark RED CURRANT for "skin soap, scented body  
22 spray, scented room spray, and incense." MINE is without sufficient knowledge or  
23 information to form a belief as to the truth of the remaining allegations contained in  
24 Paragraph 18 of the Complaint and, on that basis, denies them.

25       19.     MINE admits only that U.S. Trademark Registration No. 2,720,907  
26 attached as Exhibit 4 to the Complaint on its face appears to have been issued in  
27 Plaintiff's name for the purported mark RED CURRANT for "candles and tapers."  
28 MINE is without sufficient knowledge or information to form a belief as to the truth

1 of the remaining allegations contained in Paragraph 19 of the Complaint and, on that  
2 basis, denies them.

3 20. MINE denies infringing or engaging in any conduct likely to cause  
4 confusion between Plaintiff's products and MINE's products. MINE is without  
5 sufficient knowledge or information to form a belief as to the truth of the remaining  
6 allegations contained in Paragraph 20 of the Complaint and, on that basis, denies  
7 them.

8 21. MINE admits the truth of the allegations contained in Paragraph 21 of the  
9 Complaint and, on that basis, denies them.

10 22. Mine admits the truth of the allegations contained in Paragraph 22 of the  
11 Complaint.

12 23. Mine denies the truth of the allegations contained in Paragraph 23 of the  
13 Complaint.

14 24. Mine denies the truth of the allegations contained in Paragraph 24 of the  
15 Complaint.

16 **ANSWER TO THE ALLEGATIONS IN**  
17 **THE FIRST CAUSE OF ACTION FOR INFRINGEMENT OF TRADEMARK**

18 25. With respect to Paragraph 25 of the complaint, MINE incorporates by  
19 reference each and every response contained in paragraphs 1 through 24 above, as  
20 though fully set forth herein.

21 26. Because the allegations of Paragraph 26 of the Complaint contain only  
22 conclusions of law, MINE is not required to provide a response, and therefore, denies  
23 the same.

24 27. MINE is without sufficient knowledge or information to form a belief as  
25 to the truth of the allegations in Paragraph 27 of the Complaint and, on that basis,  
26 denies them.

27 28. MINE denies the truth of the allegations contained in Paragraph 28 of the  
28 Complaint.

1 29. MINE denies the truth of the allegations contained in Paragraph 29 of the  
2 Complaint.

3 30. MINE denies the truth of the allegations contained in Paragraph 30 of the  
4 Complaint.

5 31. MINE denies the truth of the allegations contained in Paragraph 31 of the  
6 Complaint.

7 32. MINE denies the truth of the allegations contained in Paragraph 32 of the  
8 Complaint.

9 33. MINE denies the truth of the allegations contained in Paragraph 33 of the  
10 Complaint.

11 34. MINE denies the truth of the allegations contained in Paragraph 34 of the  
12 Complaint.

13 35. MINE denies the truth of the allegations contained in Paragraph 35 of the  
14 Complaint.

15 36. MINE denies the truth of the allegations contained in Paragraph 36 of the  
16 Complaint.

17 37. Because the allegations of Paragraph 37 of the Complaint contain only  
18 conclusions of law, MINE is not required to provide a response, and therefore, denies  
19 the same.

20 38. Because the allegations of Paragraph 39 of the Complaint contain only  
21 conclusions of law, MINE is not required to provide a response, and therefore, denies  
22 the same.

23 **ANSWER TO THE ALLEGATIONS IN**

24 **THE SECOND CAUSE OF ACTION FOR UNFAIR COMPETITION**

25 39. With respect to paragraph 39 of the Complaint, MINE incorporates by  
26 reference each and every response contained in paragraphs 1 through 38 above, as  
27 though fully set forth herein.  
28

1 40. MINE acknowledges only that the Complaint purports to arise, in part,  
2 under Section 43(a) of the Lanham Act. MINE denies the truth of the remaining  
3 allegations contained in Paragraph 41 of the Complaint.

4 41. MINE denies the truth of the allegations contained in Paragraph 41 of the  
5 Complaint.

6 42. MINE denies the truth of the allegations contained in Paragraph 42 of the  
7 Complaint.

8 43. MINE denies the truth of the allegations contained in Paragraph 43 of the  
9 Complaint.

10 44. Because the allegations of Paragraph 44 of the Complaint contain only  
11 conclusions of law, MINE is not required to provide a response, and therefore, denies  
12 the same.

13 45. MINE denies the truth of the allegations contained in Paragraph 45 of the  
14 Complaint.

15 46. MINE denies the truth of the allegations contained in Paragraph 46 of the  
16 Complaint.

17 47. Because the allegations of Paragraph 47 of the Complaint contain only  
18 conclusions of law, MINE is not required to provide a response, and therefore, denies  
19 the same.

20 48. Because the allegations of Paragraph 48 of the Complaint contain only  
21 conclusions of law, MINE is not required to provide a response, and therefore, denies  
22 the same.

23 **ANSWER TO THE ALLEGATIONS IN**

24 **THE THIRD CAUSE OF ACTION FOR FALSE ADVERTISING**

25 49. With respect to paragraph 49 of the Complaint, MINE incorporates by  
26 reference each and every response contained in paragraphs 1 through 48 above, as  
27 though fully set forth herein.  
28

1 50. MINE acknowledges only that the Complaint purports to arise, in part,  
2 under Cal. Bus. & Prof. Code 17200. MINE denies the truth of the remaining  
3 allegations contained in Paragraph 50 of the Complaint.

4 51. MINE denies the truth of the allegations contained in Paragraph 51 of the  
5 Complaint.

6 52. MINE denies the truth of the allegations contained in Paragraph 52 of the  
7 Complaint.

8 53. MINE denies the truth of the allegations contained in Paragraph 53 of the  
9 Complaint.

10 54. MINE denies the truth of the allegations contained in Paragraph 54 of the  
11 Complaint.

12 55. MINE denies the truth of the allegations contained in Paragraph 55 of the  
13 Complaint.

14  
15 **ANSWER TO THE ALLEGATIONS IN**  
16 **THE FOURTH CAUSE OF ACTION FOR**  
17 **COMMON LAW TRADEMARK INFRINGEMENT**

18 56. With respect to paragraph 56 of the Complaint, MINE incorporates by  
19 reference each and every response contained in paragraphs 1 through 55 above, as  
20 though fully set forth herein.

21 57. MINE acknowledges only that the Complaint purports to arise, in part,  
22 under common law trademark infringement. MINE denies the truth of the remaining  
23 allegations contained in Paragraph 57 of the Complaint.

24 58. MINE denies the truth of the allegations contained in Paragraph 58 of the  
25 Complaint.

26 59. MINE denies the truth of the allegations contained in Paragraph 59 of the  
27 Complaint.  
28

1 60. MINE denies the truth of the allegations contained in Paragraph 60 of the  
2 Complaint.

3 61. MINE denies the truth of the allegations contained in Paragraph 61 of the  
4 Complaint.

5 62. MINE denies the truth of the allegations contained in Paragraph 62 of the  
6 Complaint.

7 63. MINE denies the truth of the allegations contained in Paragraph 63 of the  
8 Complaint.

9 64. MINE denies the truth of the allegations contained in Paragraph 64 of the  
10 Complaint.

11  
12 **ANSWER TO THE ALLEGATIONS IN**  
13 **THE FIFTH CAUSE OF ACTION FOR**  
14 **COMMON LAW TRADEMARK UNFAIR COMPETITION**

15 65. With respect to paragraph 65 of the Complaint, MINE incorporates by  
16 reference each and every response contained in paragraphs 1 through 64 above, as  
17 though fully set forth herein.

18 66. MINE acknowledges only that the Complaint purports to arise, in part,  
19 under common law unfair competition. MINE denies the truth of the remaining  
20 allegations contained in Paragraph 66 of the Complaint.

21 67. MINE denies the truth of the allegations contained in Paragraph 67 of the  
22 Complaint.

23 68. MINE denies the truth of the allegations contained in Paragraph 68 of the  
24 Complaint.

25 69. MINE denies the truth of the allegations contained in Paragraph 69 of the  
26 Complaint.

27 70. MINE denies the truth of the allegations contained in Paragraph 70 of the  
28 Complaint.

1 71. MINE denies the truth of the allegations contained in Paragraph 71 of the  
2 Complaint.

3 72. MINE denies the truth of the allegations contained in Paragraph 72 of the  
4 Complaint.

5  
6 **AFFIRMATIVE DEFENSES**

7 MINE asserts the following affirmative defenses to each Count and claim raised  
8 in the Complaint, unless otherwise indicated.

9  
10 **FIRST AFFIRMATIVE DEFENSE**

11 **(Failure to State a Claim)**

12 73. The Complaint, and each claim raised, fails to state a claim against MINE  
13 upon which relief may be granted.

14  
15 **SECOND AFFIRMATIVE DEFENSE**

16 **(Invalidity/Unenforceability)**

17 74. Plaintiff should not prevail because the descriptor "red currant" as used  
18 by the Plaintiff does not constitute a trademark use and therefore, is not capable of  
19 trademark protection.

20  
21 **THIRD AFFIRMATIVE DEFENSE**

22 **(Non-infringement)**

23 75. MINE 's accused activities relating to its uses of the "red currant" and  
24 "soku lime" descriptors do not constitute trademark uses and therefore, cannot  
25 constitute infringement of any alleged trademark in those descriptors.

**FOURTH AFFIRMATIVE DEFENSE****(Fair Use)**

76. MINE 's accused activities relating to its uses of the "red currant" and "soku lime" descriptors constitute fair uses and thus are not actionable.

**FIFTH AFFIRMATIVE DEFENSE****(Estoppel)**

77. The Complaint, and each and every cause of action asserted therein against MINE, is barred, in whole or in part, by the doctrine of estoppel.

**SIXTH AFFIRMATIVE DEFENSE****(Laches)**

78. The Complaint, and each and every cause of action asserted therein against MINE, is barred, in whole or in part, by the doctrine of laches.

**SEVENTH AFFIRMATIVE DEFENSE****(Full Disclosure)**

79. Plaintiff should not prevail with respect to Plaintiff's Third Cause of Action against MINE because MINE provides full and adequate disclosure to customers.

**EIGHTH AFFIRMATIVE DEFENSE****(Unclean Hands)**

80. The Complaint, and each and every cause of action asserted therein against MINE, is barred, in whole or in part, by the doctrine of unclean hands.

**NINTH AFFIRMATIVE DEFENSE****(Mistake or Inadvertence)**

81. Plaintiff should not prevail with respect to Plaintiff's Third Cause of Action in the Complaint against MINE, because the conduct complained of occurred, if at all, as a result of mistake or inadvertence.

**TENTH AFFIRMATIVE DEFENSE****(Invalidity/Unenforceability)**

82. Plaintiff should not prevail because the descriptor "red currant" is generic and/or descriptive and therefore, is not capable of trademark protection.

83.

WHEREFORE, Defendant MINE prays for judgment against Plaintiff as follows:

- a. That Plaintiff take nothing by reason of its Complaint or otherwise;
- b. A dismissal of the Complaint with prejudice;
- c. MINE be awarded its reasonable attorneys' fees, costs and other expenses incurred in this action; and
- d. For such other and further relief as the Court deems proper.

DATED: July 14, 2004

MINE DESIGN, a sole proprietorship

By: 

AMAL FLORES, owner

**PROOF OF SERVICE BY MAIL**

I am a resident of Los Angeles county, am over the age of 18, and am representing the defendant in this action in pro per. Defendant's mailing address is Post Office Box 16775, Beverly Hills, California 90209.

On July 14, 2004, I served the within document entitled

**ANSWER AND AFFIRMATIVE DEFENSES OF  
DEFENDANT MINEDESIGN TO PLAINTIFF'S COMPLAINT**

on the interested parties in the above action, by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

Gregory P. Goonan  
THE AFFINITY LAW GROUP APC  
600 W Broadway, Suite 400  
San Diego, CA 92101  
Tel: 619-702-4335  
Fax: 619-515-1197

☒ BY MAIL: I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California as first class mail.

Executed on July 14, 2004 at Los Angeles, California.

  
AMAL FLORES

# **EXHIBIT 3**

LOGGED

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2005 OCT 20 PM 2:52  
CLERK, U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIF.  
LOS ANGELES

ENTERED  
CLERK, U.S. DISTRICT COURT  
NOV - 8 2005  
CENTRAL DISTRICT OF CALIFORNIA  
BY *BS* DEPUTY

FILED  
CLERK, U.S. DISTRICT COURT  
NOV - 7 2005  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

STAMPED

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*11/11/11*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Votivo, Ltd, a Washington corporation,  
Plaintiff,  
vs.  
Mine Design, a business entity of unknown  
form,  
Defendant.

Case No. CV 03-6017-DT (*Ex*)  
**[PROPOSED]  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This matter comes before the Court on the Continued Motion for Entry of Default Judgment (the "Motion") filed by Plaintiff Votivo, Ltd. ("Votivo"). Pursuant to and in accordance with the Court's order dated July 15, 2005 (the "July 15 Order"), and after full consideration of the files and records in this matter and the evidence and briefing submitted by the parties, the Court grants Votivo's Motion and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Votivo is a corporation organized and existing under the laws of the State of Washington with its principal place of business in Seattle, Washington.

**EXHIBIT**  
A

*46*

- 1 2. Votivo is one of the country's leading manufacturers and distributors of home decor  
2 products, gift products and personal care products. Among the many products sold by  
3 Votivo are candles, burning sticks and incense, scented room sprays, skin soaps, and  
4 scented body sprays.
- 5 3. Since at least as early as 1999, Votivo has used a variety of distinctive trademarks to  
6 advertise and promote its products.
- 7 4. Votivo's family of trademarks is distinctive when applied to Votivo's products. Because  
8 of the excellent sales and extensive promotion of Votivo's products, Votivo's family of  
9 trademarks have become well known to consumers and others in the personal care, home  
10 decor and gift industries as identifying unique and desirable products of the highest quality  
11 that originate with Votivo.
- 12 5. Consequently, Votivo's trademarks are very important and valuable business assets of  
13 Votivo, and represent significant business goodwill.
- 14 6. Among the distinctive and valuable trademarks owned and used by Votivo are the  
15 trademarks "Red Currant" and "Soku Lime." Votivo owns United States Trademark  
16 Registration Nos. 2,720,906 and 2,720, 907 for the Red Currant mark and United States  
17 Trademark Registration Nos. 2,717,256 and 2,717, 257 for the Soku Lime mark. Votivo's  
18 Red Currant trademark and Soku Lime trademark are sometimes collectively referred to  
19 herein as the "Votivo Trademarks."
- 20 7. From August 10, 2003 through August 14, 2003, representatives of Votivo attended the  
21 New York International Gift Show (the "New York Show") in New York City. During the  
22 New York Show, Votivo discovered for the first time that Defendant was infringing the  
23 Votivo Trademarks by selling scented candles and other products using the Votivo  
24 Trademarks and by using the Votivo Trademarks to market, advertise, and sell Defendant's  
25 products in a manner that was likely to cause confusion among the public.
- 26 8. On August 11, 2003, Votivo's counsel sent a cease and desist letter to Defendant notifying  
27 Defendant about Votivo's trademark rights and explaining to Defendant that it was  
28

RECEIVED

1 infringing Votivo's trademark rights by promoting and selling products using the Votivo  
2 Trademarks.

3 9. By its August 11 letter, counsel demanded that Defendant immediately cease and desist  
4 from any further use of the Votivo Trademarks and any further marketing or sale of  
5 products in association with the Votivo Trademarks.

6 10. Prior to the date Votivo filed this action, Defendant did not confirm in writing as  
7 demanded by the August 11 letter that Defendant would cease and desist from any further  
8 sale of products in association with the Votivo Trademarks and from any further  
9 infringement of the Votivo Trademarks.

10 11. Votivo filed its Complaint in this action on August 22, 2003.

11 12. Votivo's Complaint was personally served on Defendant on February 7, 2004.

12 13. Since Votivo filed this suit, it has learned that Defendant continues to market and sell  
13 products using product names and designations that are confusingly similar to Votivo's  
14 Red Currant trademark.

15 14. Since filing this lawsuit, Votivo also has discovered that – notwithstanding that Votivo  
16 already has sued Defendant for trademark infringement – Defendant has been marketing  
17 and selling products that infringe other registered trademarks owned by Votivo in addition  
18 to the Red Currant and Soku Lime marks.

19 15. Defendant filed its answer to Votivo's Complaint on July 14, 2004.

20 16. The Court held a Rule 16(b) Scheduling Conference on November 22, 2004. Counsel for

21 Votivo appeared at the Rule 16(b) Scheduling Conference. No appearance was made on  
22 behalf of Defendant at the Rule 16(b) Scheduling Conference even though the Court had  
23 sent written notice of the Rule 16(b) Scheduling Conference both to counsel for Votivo  
24 and to Defendant, and counsel for Votivo had written to Defendant on October 22, 2004  
25 and again on November 10, 2004 to also notify and remind Defendant of the Rule 16(b)  
26 Scheduling Conference.

27 17. Because Defendant failed to appear at the regularly-scheduled Rule 16(b) Scheduling  
28 Conference, the Court struck Defendant's answer and entered default against Defendant.

- 1 18. On May 2, 2005, Defendant filed a Motion to Set Aside Default, which was regularly  
2 scheduled for a hearing on May 31, 2005.
- 3 19. On May 9, 2005, Votivo filed a Motion for Entry of Default Judgment, which was  
4 regularly scheduled for hearing on May 31, 2005.
- 5 20. Defendant again failed to appear at the regularly-scheduled hearing on May 31, 2005.  
6 Consequently, the Court denied Defendant's Motion to Set Aside Default.
- 7 21. At the May 31, 2005 hearing, the Court denied Votivo's Motion for Entry of Default  
8 Judgment without prejudice. At the May 31, 2005 hearing, the Court stated it would enter  
9 a permanent injunction in the form requested by Votivo, but asked Votivo to submit  
10 additional briefing in support of its request for an award of attorneys' fees and its request  
11 for punitive damages.
- 12 22. Votivo filed a Continued Motion for Entry of Default Judgment on June 20, 2005. By its  
13 Continued Motion for Entry of Default Judgment, Votivo sought the following relief: (a) a  
14 permanent injunction prohibiting Defendant from infringing Votivo's Red Currant, Soku  
15 Lime, and Tall Grass registered trademarks, and any and all other trademarks owned by  
16 Votivo which are protected by federal trademark registrations; (b) an award of attorneys  
17 fees in the amount of \$24,850.00; and (c) an award of punitive damages in the amount of  
18 \$75,000.00.
- 19 23. On July 7, 2005, just two days before the regularly-scheduled hearing on Votivo's  
20 Continued Motion for Entry of Default Judgment, Defendant filed a Notice of Cross-  
21 Motion and another Motion to Set Aside Default.
- 22 24. The papers filed by Defendant on July 7, 2005 failed to provide any meaningful  
23 explanation why Defendant failed to appear either at the Rule 16(b) Scheduling  
24 Conference regularly scheduled for November 22, 2004 or the regularly-scheduled hearing  
25 scheduled for May 31, 2005 on Defendant's first Motion to Set Aside Default.
- 26 25. The papers filed by Defendant on July 7, 2005 also did not provide any meaningful  
27 explanation as to why Defendant waited until just two days before the hearing on Votivo's  
28

Continued Motion for Entry of Default Judgment to file yet another motion seeking to set aside the default.

26. Defendant is not a minor or incompetent person.

27. The Soldiers and Sailors Civil Relief Act of 1990 does not apply to Defendant.

28. To the extent that any of the conclusions of law set forth below may be deemed to be findings of fact, they are incorporated herein by this reference.

### CONCLUSIONS OF LAW

1. Pursuant to Federal Rule of Civil Procedure 55(c), Defendant bears the burden of proving that good cause exists for the Court to set aside the default entered by the Court against Defendant. [*See American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9<sup>th</sup> Cir. 2000).]

2. Whether there is good cause to set aside a default is determined based on consideration of the following factors: (a) whether the defendant engaged in culpable conduct that lead to the default; (b) whether the defendant has a meritorious defense; and (c) whether the plaintiff would be prejudiced if the default was set aside. [*See id.*] If the defendant fails to meet its burden on any of the above three factors, it is appropriate for the Court to not set aside the default. [*See Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9<sup>th</sup> Cir. 1987).]

3. For the reasons set forth herein and in the July 15 Order, and after due consideration of the factors set forth above, the Court finds and concludes that Defendant has failed to sustain its burden of proving that good cause exists to set aside the default entered against it. The Court accordingly finds and concludes that the default entered against Defendant should not and will not be set aside.

4. For the reasons set forth herein and in the July 15 Order, the Court finds and concludes that entry of a default judgment against Defendant is warranted and appropriate.

5. For purposes of a default judgment, the well-pled allegations of the plaintiff's complaint are taken as true. [*See Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 918 (9<sup>th</sup> Cir.

1 1987).] If a defendant is in default, the defendant's liability is collectively established and  
2 the factual allegations in the complaint, except those relating to damages, are accepted as  
3 true. [*See Geddes v. United Financial Group*, 559 F.2d 557, 560 (9<sup>th</sup> Cir. 1977).]  
4 6. Based upon the foregoing, the Court finds and concludes that the well-pled facts alleged in  
5 Votivo's complaint and set forth herein establish that Defendant is liable to Votivo for: (a)  
6 federal trademark infringement; (b) violation of Lanham Act Section 43(a); (c) violation of  
7 California Business & Professions Code section 17200 et seq.; (d) common law trademark  
8 infringement; and (e) common law unfair competition.  
9 7. The Court is authorized under Section 34(a) of the Lanham Act, 15 U.S.C. § 1116(a), to  
10 enter injunctions, according to the principles of equity and upon such terms as the Court  
11 may deem reasonable, to prevent the violation of any registered trademark.  
12 8. Pursuant to Section 34(a) of the Lanham Act, 15 U.S.C. § 1116(a), the Court finds and  
13 concludes that a permanent injunction in the form requested by Votivo should be entered  
14 to prohibit Defendant, and all persons acting in concert and participation with Defendant,  
15 from infringing (a) Votivo's Red Currant trademark; (b) Votivo's Soku Lime trademark;  
16 (c) Votivo's Tall Grass trademark; and (d) any and all other registered trademarks owned  
17 by Votivo.  
18 9. For the reasons set forth in the July 15 Order, the Court finds and concludes that Votivo is  
19 entitled to an award of attorneys' fees in the amount of \$19,800.00 as well as an award of  
20 litigation costs pursuant to 28 U.S.C. § 1920.

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1 10. For the reasons set forth in the July 15 Order, the Court finds and concludes that Votivo is  
2 not entitled to an award of punitive damages.

3 11. To the extent that any of the findings of facts set forth above may be deemed to be  
4 conclusions of law, they are incorporated herein by this reference.  
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8 Dated: NOV - 7 2005

9 DICKRAN TEVRIZIAN  
10 United States District Judge  
11  
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13 Presented By:

14 THE AFFINITY LAW GROUP APC  
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16 By: 

17 Gregory P. Goodman  
18 Attorneys for Plaintiff  
19 Votivo Ltd.  
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**PROOF OF SERVICE**

SCANNED

**Votivo, Ltd. v. Mine Design, USDC Case No. 03-6017-DT (Ex)**

STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within entitled action; my business address is 600 West Broadway, Suite 2800, San Diego, California 92101.

On October 26, 2005, I served that document entitled **See Attached List** on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

**See Attached List**

**BY PERSONAL DELIVERY.** I delivered such envelope by hand to the offices of the addressee.

X **BY MAIL.** I caused such envelope with postage thereon fully prepaid to be placed in the U.S. Mail at San Diego, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

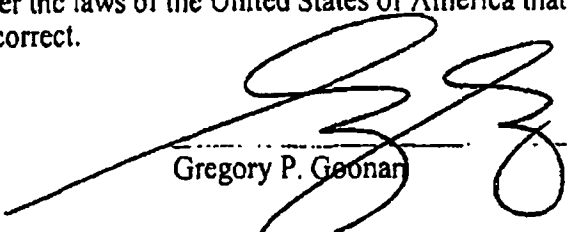
**BY FACSIMILE TRANSMISSION.** I caused such document to be transmitted to the addressee(s) facsimile number(s) noted herein. The facsimile machine used complies with Rule 2003 and no error was reported by the machine. Pursuant to Rule 2008(e), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

**BY FEDERAL EXPRESS.** I caused such envelope to be deposited at the Federal Express office at San Diego, California for guaranteed one/two day delivery with delivery charges prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for delivery by Federal Express delivery service. Under that practice, it would be deposited with the delivery service on that same day with delivery charges thereon fully prepaid at San Diego, California in the ordinary course of business for delivery to the addressee.

Executed on October 26, 2005, at San Diego, California.

(State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

X (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

  
Gregory P. Geonart

**SERVICE LIST**

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Carlos M. Candeloro, Esq.  
Carlos M. Candeloro Law Offices  
4724 Kester Avenue, Suite 205  
Sherman Oaks, CA 91403

DOCUMENTS SERVED

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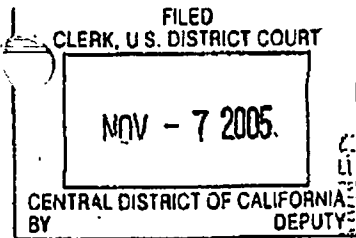
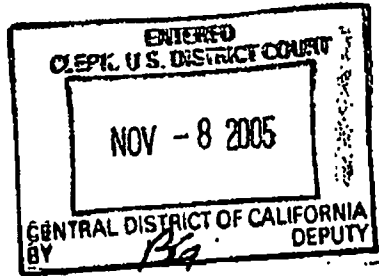
1. [Proposed] Findings of Fact and Conclusions of Law
2. [Proposed] Final Judgment
3. [Proposed] Permanent Injunction

# **EXHIBIT 4**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Votivo, Ltd, a Washington corporation,

Plaintiff,

vs.

Mine Design, a business entity of unknown  
form,

Defendant.

Case No. CV 03-6017-DT (Ex)

~~PROPOSED~~  
PERMANENT INJUNCTION

This matter comes before the Court on the Motion for Continued Entry of Default  
Judgment (the "Application") filed by Plaintiff Votivo, Ltd. ("Votivo"). Pursuant to and in

accordance with the Court's order dated July 15, 2005 granting Votivo's Motion and ordering the  
entry of judgment in this matter, and the Findings of Fact and Conclusions of Law entered by the  
Court pursuant thereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendant, and its owners, controlling persons, officers, directors, agents, servants,  
employees, contractors, successors, and attorneys, and all those persons in active concert or  
participation with them who receive actual notice of this Permanent Injunction by personal  
service, service on Defendant's counsel, or otherwise, are hereby permanently enjoined and

45

1 restrained from:

2 a. using the term "Red Currant" or any other term, symbol, trademark, service mark,  
3 domain name, trade name, or corporate or other entity name that is confusingly or substantially  
4 similar to the term "Red Currant" -- including, without limitation, the term "Currant (Red)" -- in  
5 connection in connection with candles and tapers, burning sticks and incense, scented room  
6 sprays, scented skin soaps, scented body sprays, and any other scented products for household or  
7 personal care use;

8  
9 b. using the term "Soku Lime" or any other term, symbol, trademark, service mark,  
10 domain name, trade name, or corporate or other entity name that is confusingly or substantially  
11 similar to the term "Soku Lime", in connection with in connection with candles and tapers,  
12 burning sticks and incense, scented room sprays, scented skin soaps, scented body sprays, and any  
13 other scented products for household or personal care use;

14  
15 c. using the term "Tall Grass" or any other term, symbol, trademark, service mark, domain  
16 name, trade name, or corporate or other entity name that is confusingly or substantially similar to  
17 the term "Soku Lime", in connection with in connection with candles and tapers, burning sticks  
18 and incense, scented room sprays, scented skin soaps, scented body sprays, and any other scented  
19 products for household or personal care use;

20  
21 d. using any of the terms set forth on Exhibit "A" hereto, each of which is the subject of a  
22 United States trademark registration owned by Votivo, or any other term, symbol, trademark,  
23 service mark, domain name, trade name, or corporate or other entity name that is confusingly or  
24 substantially similar to the terms listed on Exhibit "A", in connection with in connection with  
25 candles and tapers, burning sticks and incense, scented room sprays, scented skin soaps, scented  
26 body sprays, and any other scented products for household or personal care use.

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1           2.     Defendant shall take all reasonable steps to ensure that its owners, controlling  
2 persons, officers, directors, agents, servants, employees, contractors, successors, and attorneys, do  
3 not violate the terms of this Permanent Injunction. Defendant shall not assist any person or entity,  
4 directly or indirectly, in violating the terms of this Permanent Injunction or in forming new entities  
5 which violate the terms of this Permanent Injunction.

6           3.     This Court shall retain jurisdiction over the parties hereto for the purposes of any  
7 proceeding to enforce this Permanent Injunction. In the event Defendant, or any of its owners,  
8 controlling persons, officers, directors, agents, servants, employees, contractors, successors, and  
9 attorneys, or any persons in active concert or participation with them who receive actual notice of  
10 this Permanent Injunction by personal service, service on Defendant's counsel, or otherwise,  
11 violate any of the terms of this Permanent Injunction, Votivo shall be entitled to immediately seek  
12 an order to show cause as to why Defendant should not be held in contempt because of such  
13 violation. In the event the Court finds that any violation by Defendant of the terms of this  
14 Permanent Injunction has taken place, Votivo shall be entitled to its reasonable attorneys' fees and  
15 costs incurred in addressing such violation.

16           4.     This Permanent Injunction, along with the Final Judgment entered  
17 contemporaneously herewith, together constitute a final judgment in this action and suitable for  
18 entry by the Clerk pursuant to FRCP 58 and 79(a).

19  
20           IT IS SO ORDERED.

21  
22           NOV -7 2005

23     Dated: \_\_\_\_\_

24                                 DICKRAN TEVRIZIAN  
25                                 United States District Judge  
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1 Presented By:

2 THE AFFINITY LAW GROUP APC

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4 By: 

5 Gregory P. Goonan  
6 Attorneys for Plaintiff  
7 Votivo Ltd.

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Exhibit "A" To Permanent Injunction

Votivo, Ltd. v. Mine Design (USDC Case No. CV 03-6017-DT)

SCANNED

<u>Votivo Trademark</u>	<u>US Registration No.</u>
V Votivo	2,932,538; 2,555,183; 2,555,182; 1,932,316
Tibetan Lily	2,896,645; 2,827,319
Cottage Light	2,894,438
River Rock	2,894,148
Votivo Flowers	2,758,447; 2,883,829
Votivo Aromatic Pillar	2,892,674; 2,890,864
Votivo Aromatic Floating Candles	2,890,863
Vanilla Grapefruit	2,718,889; 2,718,890
Bungalow Light	2,883,736
Teak	2,720,905; 2,720,904
Freesia & Tiger Lily	2,846,979; 2,846,978
Blackberry Basil	2,841,930; 2,837,475
Joie-de-Noel	2,816,469; 2,816,468
Celadon Tea	2,793,818
Woodland Hyacinth.	2,788,139
Votivo	2,758,447; 2,766,047; 2,741,443
Minted Pomegranate	2,758,232; 2,713,167
Bradford Cucumber	2,713,166
Clean Crisp White	2,711,059

Cedar & Sage	2,728,816; 2,731,600
Deep Clover	2,715,429; 2,713,162
Anjou Pear	2,749,671
Gingered Currant	2,749,670
Golden Fuji Apple	2,749,669
Mt. Airy Azalea	2,720,910
Shenandoah Wildflower	2,684,963
Sea Island Grapefruit	2,758,231
Somerset Rain	2,713,160
Nantucket Christmas	2,749,668
Lavender Fields	2,749,667
Fresh Tomato Leaf	2,731,598
Augusta Peach	2,684,962
Black Ginger	2,705,581
Coventry Meadow	2,708,993
Paperwhite Narcissus	2,731,597
<del>Mandarine</del>	<del>2,720,908; 2,728,815</del>
Desert	2,717,267; 2,717,266
Moroccan Fig	2,717,265; 2,717,264
Forest	2,717,263; 2,717,262
Night	2,717,261; 2,717,260
Tall Grass	2,717,259; 2,717,258
Sumatra Lemongrass	2,720,903

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Tuscan Olive	2,749,665
Squash Blossom	2,720,902
St. Germain-en-Laye Lavender	2,720,901
Rosemary Garden	2,723,693
Rhone Valley Lilac	2,720,900
Westminster Bayberry	2,717,255
Mahogany	2,696,855
Votivo Aromatic Candle No. 25 Joie de Noel 73 oz	2,661,470
Votivo Aromatic Moisturizing Soap	2,699,254
Votivo Aromatic Candle No. 7.3 oz	2,554,977
Votivo 20 Aromatic Burning Sticks	2,554,976

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**PROOF OF SERVICE**

**Votivo, Ltd. v. Mine Design, USDC Case No. 03-6017-DT (Ex)**

SCANNED

STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within entitled action; my business address is 600 West Broadway, Suite 2800, San Diego, California 92101.

On October 26, 2005, I served that document entitled **See Attached List** on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

**See Attached List**

**BY PERSONAL DELIVERY.** I delivered such envelope by hand to the offices of the addressee.

X **BY MAIL.** I caused such envelope with postage thereon fully prepaid to be placed in the U.S. Mail at San Diego, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

**BY FACSIMILE TRANSMISSION.** I caused such document to be transmitted to the addressee(s) facsimile number(s) noted herein. The facsimile machine used complies with Rule 2003 and no error was reported by the machine. Pursuant to Rule 2008(e), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

**BY FEDERAL EXPRESS.** I caused such envelope to be deposited at the Federal Express office at San Diego, California for guaranteed one/two day delivery with delivery charges prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for delivery by Federal Express delivery service. Under that practice, it would be deposited with the delivery service on that same day with delivery charges thereon fully prepaid at San Diego, California in the ordinary course of business for delivery to the addressee.

Executed on October 26, 2005, at San Diego, California.

(State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

X (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Gregory P. Geonard

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Carlos M. Candeloro, Esq.  
Carlos M. Candeloro Law Offices  
4724 Kester Avenue, Suite 205  
Sherman Oaks, CA 91403

**DOCUMENTS SERVED**

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1. [Proposed] Findings of Fact and Conclusions of Law

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2. [Proposed] Final Judgment

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3. [Proposed] Permanent Injunction

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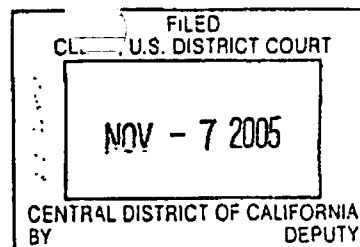
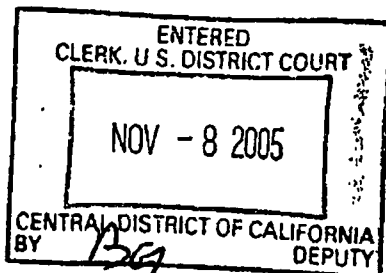
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# **EXHIBIT 5**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Votivo, Ltd, a Washington corporation,

Plaintiff,

vs.

Mine Design, a business entity of unknown  
form,

Defendant.

Case No. CV 03-6017-DT (*Ex*)

**[PROPOSED]  
FINAL JUDGMENT**

This matter comes before the Court on the Continued Motion for Entry of Default Judgment (the "Motion") filed by Plaintiff Votivo, Ltd. ("Votivo"). Pursuant to and in accordance with the Court's order dated July 15, 2005 and the Court's findings of fact and conclusions of law entered pursuant thereto, the Court grants Votivo's Motion and orders the entry of judgment in this matter as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. A permanent injunction in the form attached hereto as Exhibit "A" shall be, and hereby is, entered against Defendant and in favor of Votivo.

///

**[PROPOSED] FINAL JUDGMENT**

*47*

1           2.     Attorneys' fees in the amount of \$19,800.00 shall be, and hereby are, awarded  
2 against Defendant and in favor of Votivo.

3           3.     Votivo shall recover costs in the amount of \$ \_\_\_\_\_ from and against  
4 Defendant.

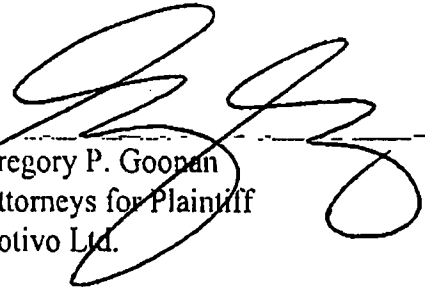
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6           IT IS SO ORDERED.

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9 Dated: NOV - 7 2005

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11                                 **DICKRAN TEVRIZIAN**  
12                                 United States District Judge

13  
14 Presented By:

15 THE AFFINITY LAW GROUP APC

16  
17 By:   
18 Gregory P. Goonan  
19 Attorneys for Plaintiff  
20 Votivo Ltd.

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 Votivo, Ltd, a Washington corporation,

Case No. CV 03-6017-DT

12 Plaintiff,

[PROPOSED]  
PERMANENT INJUNCTION

13 vs.

14 Mine Design, a business entity of unknown  
15 form,

16 Defendant.  
17

18 This matter comes before the Court on the Motion for Continued Entry of Default  
19 Judgment (the "Application") filed by Plaintiff Votivo, Ltd. ("Votivo"). Pursuant to and in  
20 accordance with the Court's order dated July 15, 2005 granting Votivo's Motion and ordering the  
21 entry of judgment in this matter, and the Findings of Fact and Conclusions of Law entered by the  
22 Court pursuant thereto,

23 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

24 1. Defendant, and its owners, controlling persons, officers, directors, agents, servants,  
25 employees, contractors, successors, and attorneys, and all those persons in active concert or  
26 participation with them who receive actual notice of this Permanent Injunction by personal  
27 service, service on Defendant's counsel, or otherwise, are hereby permanently enjoined and  
28

1 restrained from:

2 a. using the term "Red Currant" or any other term, symbol, trademark, service mark,  
3 domain name, trade name, or corporate or other entity name that is confusingly or substantially  
4 similar to the term "Red Currant" -- including, without limitation, the term "Currant (Red)" -- in  
5 connection in connection with candles and tapers, burning sticks and incense, scented room  
6 sprays, scented skin soaps, scented body sprays, and any other scented products for household or  
7 personal care use;

9 b. using the term "Soku Lime" or any other term, symbol, trademark, service mark,  
10 domain name, trade name, or corporate or other entity name that is confusingly or substantially  
11 similar to the term "Soku Lime", in connection with in connection with candles and tapers,  
12 burning sticks and incense, scented room sprays, scented skin soaps, scented body sprays, and any  
13 other scented products for household or personal care use;

15 c. using the term "Tall Grass" or any other term, symbol, trademark, service mark, domain  
16 name, trade name, or corporate or other entity name that is confusingly or substantially similar to  
17 the term "Soku Lime", in connection with in connection with candles and tapers, burning sticks  
18 and incense, scented room sprays, scented skin soaps, scented body sprays, and any other scented  
19 products for household or personal care use;

21 d. using any of the terms set forth on Exhibit "A" hereto, each of which is the subject of a  
22 United States trademark registration owned by Votivo, or any other term, symbol, trademark,  
23 service mark, domain name, trade name, or corporate or other entity name that is confusingly or  
24 substantially similar to the terms listed on Exhibit "A", in connection with in connection with  
25 candles and tapers, burning sticks and incense, scented room sprays, scented skin soaps, scented  
26 body sprays, and any other scented products for household or personal care use.

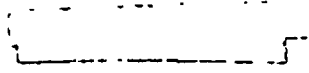
1           2.     Defendant shall take all reasonable steps to ensure that its owners, controlling  
2 persons, officers, directors, agents, servants, employees, contractors, successors, and attorneys, do  
3 not violate the terms of this Permanent Injunction. Defendant shall not assist any person or entity,  
4 directly or indirectly, in violating the terms of this Permanent Injunction or in forming new entities  
5 which violate the terms of this Permanent Injunction.

6           3.     This Court shall retain jurisdiction over the parties hereto for the purposes of any  
7 proceeding to enforce this Permanent Injunction. In the event Defendant, or any of its owners,  
8 controlling persons, officers, directors, agents, servants, employees, contractors, successors, and  
9 attorneys, or any persons in active concert or participation with them who receive actual notice of  
10 this Permanent Injunction by personal service, service on Defendant's counsel, or otherwise,  
11 violate any of the terms of this Permanent Injunction, Votivo shall be entitled to immediately seek  
12 an order to show cause as to why Defendant should not be held in contempt because of such  
13 violation. In the event the Court finds that any violation by Defendant of the terms of this  
14 Permanent Injunction has taken place, Votivo shall be entitled to its reasonable attorneys' fees and  
15 costs incurred in addressing such violation.

16           4.     This Permanent Injunction, along with the Final Judgment entered  
17 contemporaneously herewith, together constitute a final judgment in this action and suitable for  
18 entry by the Clerk pursuant to FRCP 58 and 79(a).

19  
20           IT IS SO ORDERED.

21  
22  
23     Dated: 

24                       
25                     United States District Judge  
26  
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1 Presented By:

2 THE AFFINITY LAW GROUP APC

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4 By: 

5 Gregory P. Goonan  
6 Attorneys for Plaintiff  
7 Votivo Ltd.

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SEALING

Exhibit "A" To Permanent Injunction

Votivo, Ltd. v. Mine Design (USDC Case No. CV 03-6017-DT)

SCANNED

<u>Votivo Trademark</u>	<u>US Registration No.</u>
V Votivo	2,932,538; 2,555,183; 2,555,182; 1,932,316
Tibetan Lily	2,896,645; 2,827,319
Cottage Light	2,894,438
River Rock	2,894,148
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Votivo Aromatic Pillar	2,892,674; 2,890,864
Votivo Aromatic Floating Candles	2,890,863
Vanilla Grapefruit	2,718,889; 2,718,890
Bungalow Light	2,883,736
Teak	2,720,905; 2,720,904
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Joie de Noel	2,816,469; 2,816,468
Celadon Tea	2,793,818
Woodland Hyacinth	2,788,139
Votivo	2,758,447; 2,766,047; 2,741,443
Minted Pomegranate	2,758,232; 2,713,167
Bradford Cucumber	2,713,166
Clean Crisp White	2,711,059

Cedar & Sage	2,728,816; 2,731,600
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Golden Fuji Apple	2,749,669
Mt. Airy Azalea	2,720,910
Shenandoah Wildflower	2,684,963
Sea Island Grapefruit	2,758,231
Somerset Rain	2,713,160
Nantucket Christmas	2,749,668
Lavender Fields	2,749,667
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Augusta Peach	2,684,962
Black Ginger	2,705,581
Coventry Meadow	2,708,993
Paperwhite Narcissus	2,731,597
Mandarine	2,720,908; 2,728,815
Desert	2,717,267; 2,717,266
Moroccan Fig	2,717,265; 2,717,264
Forest	2,717,263; 2,717,262
Night	2,717,261; 2,717,260
Tall Grass	2,717,259; 2,717,258
Sumatra Lemongrass	2,720,903

Tuscan Olive	2,749,665
Squash Blossom	2,720,902
St. Germain-en-Laye Lavender	2,720,901
Rosemary Garden	2,723,693
Rhone Valley Lilac	2,720,900
Westminster Bayberry	2,717,255
Mahogany	2,696,855
Votivo Aromatic Candle No. 25 Joie de Noel 73 oz	2,661,470
Votivo Aromatic Moisturizing Soap	2,699,254
Votivo Aromatic Candle No. 7.3 oz	2,554,977
Votivo 20 Aromatic Burning Sticks	2,554,976

STAMPED

**PROOF OF SERVICE**

**Votivo, Ltd. v. Mine Design, USDC Case No. 03-6017-DT (Ex)**

**STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO**

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within entitled action; my business address is 600 West Broadway, Suite 2800, San Diego, California 92101.

On October 26, 2005, I served that document entitled **See Attached List** on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

**See Attached List**

**BY PERSONAL DELIVERY.** I delivered such envelope by hand to the offices of the addressee.

X **BY MAIL.** I caused such envelope with postage thereon fully prepaid to be placed in the U.S. Mail at San Diego, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

**BY FACSIMILE TRANSMISSION.** I caused such document to be transmitted to the addressee(s) facsimile number(s) noted herein. The facsimile machine used complies with Rule 2003 and no error was reported by the machine. Pursuant to Rule 2008(e), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

**BY FEDERAL EXPRESS.** I caused such envelope to be deposited at the Federal Express office at San Diego, California for guaranteed one/two day delivery with delivery charges prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for delivery by Federal Express delivery service. Under that practice, it would be deposited with the delivery service on that same day with delivery charges thereon fully prepaid at San Diego, California in the ordinary course of business for delivery to the addressee.

Executed on October 26, 2005, at San Diego, California.

(State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

X (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

  
Gregory P. Geonan

SERVICE LIST

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Carlos M. Candeloro, Esq.  
Carlos M. Candeloro Law Offices  
4724 Kester Avenue, Suite 205  
Sherman Oaks, CA 91403

DOCUMENTS SERVED

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3 1. [Proposed] Findings of Fact and Conclusions of Law

4 2. [Proposed] Final Judgment

5 3. [Proposed] Permanent Injunction

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PROOF OF SERVICE

# **EXHIBIT 6**

1 Carlos Candeloro, Esq.  
2 4724 Kester Ave. #205  
3 Sherman Oaks, CA 91403  
4 California State Bar No. 194716  
5 (818) 995 6766 (tel.)  
6 carlos@candeloro.net

7 Attorney for Mine Design

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10  
11 Votivo Ltd.,

12 Plaintiff,

13 v.

14 Mine Design,

15 Defendants.  
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*Notice of  
Motion And*

**Case No. CV- 03-6017-DT (Ex)**

**MINE DESIGN'S F.R.C.P. 59(e)  
MOTION AND  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**

**[Declarations of Carlos Candeloro  
and Request for Judicial Notice  
filed concurrently herewith]**

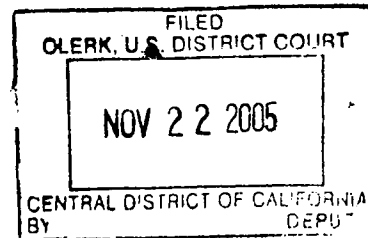
**Date: Dec. 19, 2005**

**Time: 10:00 a.m.**

**Courtroom: 880**

**Hon. Dickran Tevrizian**

28 MINE DESIGN'S F.R.C.P. 59(e) MOTION

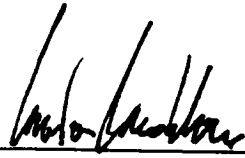


1 TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

2  
3 PLEASE TAKE NOTICE THAT, on December 19, 2005, at 10:00  
4 a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the  
5 Honorable Dickran Tevrizian, United States District Court Judge, located at the  
6 Edward R. Roybal Center & Federal Building, 255 East Temple Street, Los  
7 Angeles, California 90012, defendant Mine Design ("MINE") will and hereby does  
8 move this Court, pursuant to Rule 59(e) of the Federal Rule of Civil Procedure, to  
9 modify or amend the Judgment entered on November 8, 2005 on this case.  
10  
11

12 This Motion is based on this Notice of Motion and Motion; the  
13 attached Memorandum of Points and Authorities; the concurrently filed declaration  
14 of Carlos Candeloro the Request for Judicial Notice and exhibits thereto; the  
15 pleadings and other papers on file in this action; any further matters of which this  
16 Court may take judicial notice; and such further evidence and arguments as may be  
17 presented at or before the hearing on this matter.  
18  
19

20 DATED: November 22, 2005  
21

22  
23 By   
24 Carlos Candeloro  
25 Attorney for Defendant  
26 Mine Design  
27  
28

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<i>Cripps v. Life Ins. Co. of North America</i> , 980 F.2d 1261 (9th Cir. 1992)	3, 8
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7	<i>Mennen Co. v. Gillette Co.</i> , 565 F. Supp. 648 (S.D.N.Y. 1983), <i>aff'd</i> , 742 F.2d 1437 (2d Cir. 1984)	
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1     **I. Introduction**

2             Pursuant to Fed.R.Civ.P. 59(e) Defendant Mine Design ("MINE")  
3 respectfully requests that the Court modify or amend the Judgment entered against  
4 MINE in the present case.

5             In particular, MINE would like the Court to reconsider reliance on *Geddes v.*  
6 *United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977), for the proposition that  
7 "[i]f the defendant is in default, the defendant's liability is collectively established."  
8 [Findings of Fact and Conclusions of Law, Nov. 8, 2005, ¶ 5, p. 6.] While *Geddes*  
9 may contain language to that effect, that is not a correct statement of the law.

10            Under Ninth Circuit precedent, a defendant may prevail on the merits, even  
11 after they default, if, taking the facts alleged in the pleadings as true, plaintiff is not  
12 entitled to relief as a matter of law. [See, e.g., *Cripps v. Life Ins. Co. of North*  
13 *America*, 980 F.2d 1261, 1267 (9th Cir. 1992) and citations therein.]

14            As explained in detail in section III.C of the present motion, the allegations in  
15 Plaintiff's complaint regarding MINE's use of the term "red currant" to label red  
16 currant scented candles cannot, as a matter of law, state a valid claim. Red currant  
17 is no different than vanilla, pine, mint, strawberries or lavender. It is a product of  
18 nature with a recognized fragrance. Because red currant scented candles are an  
19 article of trade in the public domain, MINE has the right to make and sell red  
20 currant scented candles, and to label MINE's red currant scented candles with a  
21 term that truthfully describes the candles' ingredients, qualities and characteristics.  
22 MINE accordingly respectfully requests that the Court modify the Judgment and  
23 enter Judgment for MINE on all of Plaintiff's claims relating to "red currant."

24            MINE also respectfully requests that the Court revisit and reconsider the  
25 award of attorney's fees in the present case.

26            Lastly, Plaintiff's gratuitous (and surreptitious) inclusion of findings of fact  
27 on the issue of the term "tall grass" – the subject of a pending related lawsuit that  
28

1 was not decided in the present case – was in violation of clear and unambiguous  
2 instructions provided in the Court's July 21, 2005 Order. MINE accordingly hereby  
3 requests that the portion of the Findings of Fact and Conclusions of Law relating to  
4 "tall grass" and related material be stricken.

5 **II. Material Facts**

6 1. Under circumstances that are disputed by the parties, the Court entered  
7 default against MINE and, in an Order filed July 15, 2005 and entered July 21, 2005  
8 ("July 21, 2005 Order"), the Court granted Plaintiff's renewed motion for entry of  
9 default judgment against MINE.

10 2. In the July 21, 2005 Order, Plaintiff was instructed to prepare and  
11 resubmit a Proposed Judgment and Proposed Findings of Fact and Conclusions of  
12 Law in accordance with the Order.

13 3. On or about October 26, 2005, Plaintiff filed a [Proposed] Permanent  
14 Injunction, [Proposed] Findings of Fact and Conclusions of Law and a [Proposed]  
15 Final Judgment.

16 4. On November 8, 2005, the Court entered the Findings of Fact and  
17 Conclusions of Law, Permanent Injunction and Final Judgment against MINE in  
18 substantially identical form as had been submitted by Plaintiff.

19 5. According to the Court's Opinion MINE's liability was premised on  
20 MINE's default. [Findings of Fact and Conclusions of Law, ¶ 5, p. 6 ("If a  
21 defendant is in default, the defendant's liability is collectively established") citing  
22 *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1997).]

23 6. MINE was held to be liable to Votivo for: (a) federal trademark  
24 infringement; (b) violation of Lanham Act Section 43(a); (c) violation of California  
25 Business and Professions Code section 17200 et seq; (d) common law trademark  
26 infringement; and (e) common law unfair competition. [Findings of Fact and  
27 Conclusions of Law, ¶ 6, p. 6.]

7. The well-pled allegations of plaintiff's complaint were taken as true.  
[Findings of Fact and Conclusions of Law, ¶ 5, p. 5.]

8. Representative of the allegations in Plaintiff's complaint, the complaint alleges that "Votivo is informed and believes and on that basis alleges that Defendant has marketed, advertised and sold, and continues to market, advertise and sell, candles and other home décor products, gift products and personal care products using the Votivo Trademarks." [Complaint, ¶ 28, p. 6.]

9. The term "the Votivo Trademarks" is defined in the complaint to mean Votivo's alleged trademarks "Red Currant" and "Soku Lime." [Complaint, ¶ 4, p. 2.]

10. Noticeably absent from Plaintiff's complaint are any allegations that MINE was not using the alleged "Votivo Trademarks" to truthfully describe MINE's own product. In particular, there are no allegations in Plaintiff's complaint that, at a minimum, the term "red currant" did not properly describe the ingredients, qualities or characteristics of MINE's red currant scented candles.

11. Votivo's alleged trademark and registration are for the term "red currant," not the scent of red currant or the particular scent in Votivo's "Red Currant" scented candles.

12. Votivo does not hold a patent for red currant scent, or the red currant fragrance/oil for making candles that is widely available in candle making stores.

13. Votivo also does not hold a patent for the particular combination of scents in Votivo's Red Currant scented candle.

14. Votivo also does not hold a patent for red currant scented candles or for Votivo's own version of Red Currant scented candle.

15. Because they are not under patent, red currant scented candles in general, including Votivo's version of it, are in the public domain, and one and all are free to make, use and sell them.

16. Red currant fragrance is a staple article of trade. [Request for Judicial Notice, ¶¶ 4, 24-38, 45, 46.] Suppliers of the fragrance represent that their products have the scent of red currant. [See, e.g., Request for Judicial Notice, ¶ 4 and exhibit thereto (General Wax and Candle represents that its red currant scent/fragrance oil has "The berry-licious fragrance of red currant."); Request for Judicial Notice, ¶ 25 and exhibit thereto (Supplies4candles.com describes its red currant fragrance as, *inter alia*, "A divinely layered fragrance that captures the essence of this unique citrus laden berry."); Request for Judicial Notice, ¶ 26 and exhibit thereto (Rustic Escentuals describes its red currant fragrance, *inter alia*, as "Sweet, deep red currant berries harvested at their perfection."); Request for Judicial Notice, ¶ 31 and exhibit thereto (Body Perfumery and Soy Chandlery describes its "Red Currant Sorbet" fragrance as having a "deliciously sweet red currant fragrance"); Request for Judicial Notice, ¶ 35 and exhibit thereto (Wellington Fragrance Company states "Red Currant – unique and powerful [sic] you will enjoy an intoxicating berry scent."); Request for Judicial Notice, ¶ 38 and exhibit thereto (Candles Etcetera describes its Red Currant fragrance "Sweet deep red currant berries harvested at their peak of perfection.").]

17. Not surprising given the wide availability of red currant fragrance, the term "red currant" is widely used in labels and descriptions of products in the cosmetic, fragrance and scented candle industries to inform consumers that the product has a red currant fragrance, or that red currant is a "note" of said product's fragrance. [Request for Judicial Notice, ¶ 3, p. 2.]

18. A large number of candle producers manufacture red currant scented candles and label them as such. [Request for Judicial Notice, ¶¶ 5-23.] Red currant, when applied to scented candles, tells the consumers what the product is, namely, a red currant scented candle.

1           19. The red currant fragrance descriptor is not limited to scented candle  
2 products, but is also used in many other industries. Examples include the  
3 cosmetics, perfume, skincare, home décor, and pet products industries. [Request  
4 for Judicial Notice, ¶¶ 39-50.]

5 **III. Argument**

6           **A) The Present Motion Is Proper And Is Being Timely Filed.**

7  
8           Fed. R. Civ. P. 59(e) ("Rule 59(e)") provides for the filing of a motion to alter  
9 or amend a judgment. The Rule provides an efficient mechanism by which a trial  
10 court judge may alter, amend, or vacate an otherwise erroneous judgment without  
11 implicating the appellate process. [*Clipper Exxpress v. Rocky Mountain Motor*  
12 *Tariff*, 674 F.2d 1252, 1260 (9th 1982).]

13           A motion pursuant to Rule 59(e) must be filed no later than 10 days after  
14 entry of the judgment. In the present case, Judgment was entered on November 8,  
15 2005. Accordingly, the present motion, filed on November 22, 2005, was timely  
16 filed pursuant to Rule 59(e) and Rule 6(a).

17           **B) Judgment Against MINE Was Premised On A Manifest**  
18           **Error Of Law, Namely, That MINE's Liability Was**  
19           **Established By MINE's Default.**

20           According to the "Findings of Fact and Conclusions of Law" the Court  
21 reasoned that MINE's liability was established by MINE's default. [Findings of  
22 Fact and Conclusions of Law, Nov. 8, 2005, ¶ 5, p. 6.] MINE respectfully submits  
23 that was in error. While liability may have been proper in the case cited by the  
24 Court, *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977), the  
25 statement in *Geddes*, as a general proposition of law, is incorrect.

26           In a line of cases that includes *Danning v. Lavine*, 572 F.2d 1386 (9th Cir.  
27 1978), *Alan Neuman Productions v. Albright*, 862 F.2d 1388 (9th Cir. 1988) and

1 *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261 (9th Cir. 1992) the law  
2 established in the Ninth Circuit is that a court should determine whether the  
3 pleadings in the case allege a valid cause of action before a defaulting party is held  
4 liable.

5 The facts and holding in *Cripps* are believed to be particularly instructive on  
6 this issue. In that case cross-claimant alleged that life insurance proceeds were due  
7 to her under a holographic will. [*Cripps*, 980 F.2d at 1267.] Cross-defendant  
8 defaulted and judgment was entered in favor of cross-claimant. [*Id.*] On appeal the  
9 default judgment was set aside because it was legally unsupportable. [*Id.* at 1268.]  
10 Taking the alleged facts as true, cross-claimant had not made out a claim for relief  
11 because under California law a holographic will could not operate to change the  
12 beneficiary designated in a life insurance policy.

13 Taking Cynthia's alleged facts as true, we must decide  
14 whether the holographic will was effective under  
15 California law. Under California law, except in specified  
16 situations not present here, a holographic will cannot  
17 operate to change the beneficiary designated on a life  
18 insurance policy. That being the case, Cynthia has not  
19 made a claim for relief.

20 [*Id.* at 1268.]

21 Accordingly, contrary to the Court's reasoning in the present case, entry of  
22 default against MINE did not necessarily have to result in a finding of trademark  
23 infringement (and the other causes of action alleged in Plaintiff's complaint).  
24 MINE respectfully submits that, pursuant to *Cripps*, the Court should have still  
25 considered whether Plaintiff's complaint states a valid cause of action before  
26 holding MINE liable. [*Id.* at 1267 ("necessary facts not contained in the pleadings,  
27 and claims which are legally insufficient, are not established by default.").]

28 As explained in the next section, the allegations in Plaintiff's complaint  
regarding MINE's use of the term "red currant" as a matter of law do not state a

valid claim for trademark infringement and the other alleged business torts dependent thereon.

**C) The Allegations In Plaintiff's Complaint Regarding MINE's Use Of The Term "Red Currant" As A Matter Of Law Fail To State A Valid Claim For Trademark Infringement.**

1) As a matter of law, use of a name which is merely descriptive of the ingredients, qualities or characteristics of an article of trade cannot constitute trademark infringement.

Just like the allegations in *Cripps* failed to state a valid claim because, as a matter of law, under California law a holographic will could not operate to change the beneficiary of a life insurance policy, Votivo's allegations that MINE used the term "red currant" to market, advertise and sell red currant scented candles and other scented articles fails to state a valid claim for trademark infringement because it has always been the law that "[a] name which is merely descriptive of the ingredients, qualities or characteristics of an article of trade cannot be appropriated as a trademark and the exclusive use of it afforded legal protection. *Canal Co. v. Clark*, 13 Wall. 311, 323, 327, 20 L.Ed. 581; *Standard Paint Co. v. Trinidad Asphalt [Mfg.] Co.*, 220 U.S. 446, 453, 31 S.Ct. 456, 55 L.Ed. 536; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 140, 25 S.Ct. 609, 49 L.Ed. 972." *[Skinner Mfg. Co. v. Kellogg Sales Co.*, 143 F.2d 895, 898 (8th Cir. 1944) *citing Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 528, 44 S.Ct. 615, 616, 68 L.Ed. 1161.]

In *Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 528, 44 S.Ct. 615, 616, 68 L.Ed. 1161 (1924) the U.S. Supreme Court held names such as "Coco-Quinine" and

1 "Quin-Coco" could not be appropriated as trademarks, the Court saying in part:

2 The name "Coco-Quinine" is descriptive of the  
3 ingredients which enter into the preparation. The same is  
4 equally true of the name "Quin-Coco." A name which is  
5 merely descriptive of the ingredients, qualities or  
6 characteristics of an article of trade cannot be  
7 appropriated as a trademark and the exclusive use of it  
8 afforded legal protection. The use of a similar name by  
another to truthfully describe his own product does not  
constitute a legal or moral wrong, even if its effect be to  
cause the public to mistake the origin or ownership of  
the product.

9 This is still the law today. [See, e.g., *Surgicentes of America v. Medical*  
10 *Dental Surgeries*, 601 F.2d 1011, 1018 (9th Cir. 1979).]

11 Not surprisingly, the law of the Ninth Circuit is that a court should hold as a  
12 matter of law that there is no trademark infringement when an alleged trademark  
13 infringer is using an alleged mark to describe the ingredients, qualities or  
14 characteristics of an article of trade. [*New Kids On The Block v. New America Pub.,*  
15 *Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) ("the courts will hold as a matter of law that  
16 the original producer does not sponsor or endorse another product that uses his  
17 mark in a descriptive manner.").]

18 2) Plaintiff failed to allege that "red currant" does not properly  
19 indicate the ingredients, qualities or characteristics of MINE's  
20 red currant scented candles.

21 MINE, like many other scented candle producers, makes its red currant  
22 scented candles by adding a proper amount of a commercially available red currant  
23 oil/fragrance to molten soy wax. The mixture is then poured into a glass, metal  
24 sphere or compact having a properly positioned wick. Accordingly, red currant  
25 oil/fragrance is an ingredient of MINE's red currant scented candles. In addition,  
26 red currant properly describes the qualities and characteristics of the scented candle,

1 namely, its fragrance. Tellingly, no allegations to the contrary are made in  
2 Plaintiff's complaint or anywhere else in the pleadings.

3 Because, as a matter of law, it cannot be trademark infringement for a candle  
4 maker to label a scented candle with the term "red currant" when this is not only an  
5 ingredient of the candle, but also a proper description of the qualities and  
6 characteristics of the scented candle, *i.e.*, a description that the candle smells like  
7 red currant, Plaintiff's complaint fails to state a valid cause of action. [See, *e.g.*,  
8 *Kellogg Co. v. Nat. Biscuit Co.*, 305 U.S. 111, 116-117 (1938)("shredded wheat"  
9 not infringing for shredded wheat biscuit); *Skinner Mfg. Co. v. Kellogg Sales Co.*,  
10 143 F.2d 896 (8th Cir. 1944)("raisin bran" not infringing for bran with raisins in it);  
11 *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356, 358 (7th Cir.  
12 1965)(affirming directed verdict because "barbeque beans" used not as a trademark  
13 but rather a description of the product); *Eagle Snacks, Inc. v. Nabisco Brands, Inc.*,  
14 625 F.Supp 571 (D.N.J. 1985)("honey roast" not infringing when used for peanuts  
15 roasted in honey).]

16 The present case is distinguishable from *Elizabeth Taylor Cosmetics v.*  
17 *Annick Goutal*, 673 F.Supp. 1238 (S.D.N.Y. 1987), which involved the term  
18 "Passion" for a line of fragrance products. [*Id.* at 1240.] In that case the court held  
19 that the word "passion" when applied to fragrance products is not a descriptive  
20 term. [*Id.* at 1243-1244.] The court reasoned that "[i]nstead of describing the  
21 product, it describes an *emotion* the fragrance seeks to induce." [*Id.* (emphasis  
22 added).] In the present case, the term "red currant" when applied to MINE's red  
23 currant scented candles is a descriptive term because it describes the ingredients  
24 and scent of the candles. [See, *e.g.*, *In re Gyulay*, 820 F.2d 1216 (Fed.Cir.  
25 1987)(term APPLE PIE not registrable under section 2(e) of the Lanham Act  
26 because it "conveys the key characteristic of the potpourri, its scent."); *In re*  
27 *American Greetings Corp.*, 226 U.S.P.Q. 365, 366 (T.T.A.B. 1985)(APRICOT  
28

1 identifies the fact that applicant's dolls are apricot scented and that this is a  
2 significant characteristic of the goods as far as purchasers are concerned).]

3 In conclusion, because the term "red currant" would properly describe the  
4 ingredients, qualities and characteristics of MINE's red currant scented candles and  
5 no allegations to the contrary are made in Plaintiff's complaint, Plaintiff's  
6 complaint, as a matter of law, fails to state a valid cause of action against MINE for  
7 trademark infringement. Accordingly, it is respectfully requested that the Judgment  
8 be altered and Judgment of non-infringement be entered in favor of MINE on that  
9 issue.

10 3) The same result of no infringement as a matter of law is  
11 obtained using the "who-are-you/what-are-you test."

12 The same result of non infringement as a matter of law is obtained when  
13 analyzing MINE's alleged use of the term "red currant" under the "who-are-  
14 you/what-are-you test." [*Filipino Yellow Pgs.*, 198 F.3d 1143, 1147 (9th Cir.  
15 1999).] Under the test, a mark answers the buyer's question "Who are you?"  
16 "Where do you come from?" "Who vouches for you?" while the generic name of the  
17 product answers the question "what are you?" [*Id. See also, New Kids On The*  
18 *Block*, 971 F.2d at 306 ("When a trademark comes to describe a class of goods  
19 rather than an individual product, the courts will hold as a matter of law that use of  
20 that mark does not imply sponsorship or endorsement of the product by the original  
21 holder.").]

22 As shown in the accompanying Request for Judicial Notice, it is beyond  
23 reasonable dispute that "red currant" answers the question "what are you" for at  
24 least dozens, and possibly hundreds, of articles of trade in the U.S. that have a red  
25 currant fragrance.

1 When considering the specific market relating to scented candles, numerous  
2 commercial suppliers offer a red currant oil/fragrance for making red currant  
3 scented candles. [Request for Judicial Notice, ¶¶ 4, 24-38, 45, 46.] Moreover  
4 several candle makers, other than Votivo and MINE, use the term "red currant" on  
5 the label of their scented candles to describe what their candles are, namely, that  
6 their candles include a red currant fragrance. [Request for Judicial Notice, ¶¶ 5-23.]

7 The evidence leaves little room for doubt that the consuming public, when  
8 confronted with the term "red currant" on the label of a product that has a scent,  
9 including a scented candle, would understand that the term describes what the  
10 product is, not where it comes from.

11 Because MINE has the right to make red currant scented candles, it also has  
12 the right to use the term by which the public knows them. [See, e.g., *Kellogg Co. v.*  
13 *Nat. Biscuit Co.*, 305 U.S. 111, 116-117 (1938)("As Kellogg Company had the right  
14 to make the article, it had, also, the right to use the term by which the public knows  
15 it."); 2 McCarthy on Trademarks, § 12:11, 12-26 ("A seller cannot latch on to the  
16 name of an article and merely by use, claim it to be his own trademark for that  
17 article.").]

18 4) The fact that Plaintiff's alleged mark is allegedly "deceptively  
19 misdescriptive" is irrelevant to the issue of whether MINE's  
20 alleged use of the term would be infringing.

21 The fact that Votivo alleges that its "Red Currant" scented candle does not in  
22 fact smell like red currant, or is not made with red currant scent, goes to the validity  
23 and registrability of Votivo's mark, and is irrelevant to the issue of whether MINE's  
24 alleged use of the term would infringe Plaintiff's alleged mark. When it comes to a  
25 determination of infringement, what should be considered is MINE's alleged use of  
26 the term, not Votivo's.

1 It would defy the purpose of the Lanham Act if Plaintiff could obtain a  
2 trademark for the term "red currant" for scented candles that do not have a red  
3 currant scent and that Plaintiff could then preclude producers of red currant scented  
4 candles from truthfully labeling their red currant scented candles with the term.

5 Plaintiff's position would be analogous to a manufacturer of plastic toys  
6 obtaining a trademark registration for the term "stainless steel" for plastic toy  
7 wrenches and then using the trademark registration to preclude makers of real  
8 stainless steel wrenches from labeling their wrenches "stainless steel." Plaintiff's  
9 position would basically turn trademark law on its head.

10 **D) MINE respectfully requests that the Court revisit and**  
11 **reconsider the award of attorney's fees in the present case.**

12 The Lanham Act provides for an award of attorney's fees only in "exceptional  
13 cases." [17 U.S.C. § 1117.] The only thing that is exceptional about the present  
14 case is that Plaintiff's allegedly highly experienced counsel filed a complaint and  
15 continued to prosecute the case to enforce Votivo's alleged "red currant" trademark  
16 on a defendant whose alleged use of the term was non-infringing.

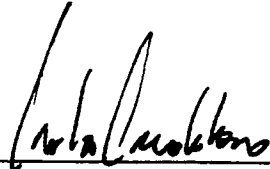
17 If someone should be awarded attorney's fees in the present case it should be  
18 the defendant. [See, e.g., *Mennen Co. v. Gillette Co.*, 565 F. Supp. 648 (S.D.N.Y.  
19 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984)(awarding defendant attorney's fees  
20 because plaintiff's claims had no real substance and suit was initiated as a  
21 competitive ploy); *Universal City Studios, Inc. v. Nintendo Co. Ltd.*, 615 F.Supp.  
22 838, 864 (D.C.N.Y. 1985)(awarding defendant attorney's fees pursuant to 17 U.S.C.  
23 § 1117 because suit was initiated in bad faith and was designed to serve ulterior  
24 business motives).]

1 **IV. Conclusion**

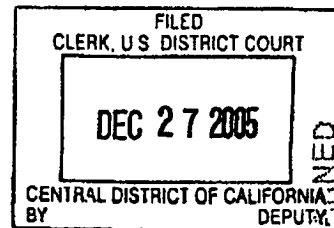
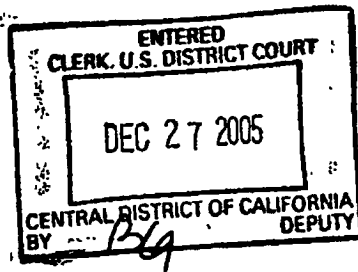
2 MINE should prevail on the merits regarding its alleged use of the term "red  
3 currant" to label red currant scented candles. Taking the facts alleged in Plaintiff's  
4 pleadings as true, Plaintiff is not entitled to relief. [See, *Cripps*, 980 F.2d at 1267  
5 ("Susan, [the defaulting party,] may prevail on the merits if she can demonstrate  
6 that, taking the facts alleged in the pleadings as true, Cynthia [the non-defaulting  
7 party,] was not entitled to relief.").]

8 For the foregoing reasons, MINE respectfully submits that the Judgment  
9 should be modified and amended and Judgment of non-liability on the merits  
10 entered in favor of MINE on all the causes of action in Plaintiff's complaint based  
11 on MINE's alleged use of the term "red currant."

12  
13  
14  
15 DATED: November 22, 2005

16  
17 By   
18 Carlos Candeloro  
19 Attorney for Defendant  
20 Mine Design  
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# **EXHIBIT 7**



Priority  
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JS-2/JS-3  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Votivo, Ltd, a Washington corporation

Plaintiff,

vs.

Mine Design, a business entity of  
unknown form,

Defendant.

CASE NO. CV 03-6017 DT (Ex)

ORDER AND OPINION DENYING  
DEFENDANT MINE DESIGN'S  
F.R.C.P. 59(e) MOTION TO ALTER  
OR AMEND FINAL JUDGMENT

**I. Background**

On November 7, 2005, this Court entered Final Judgment in favor of Plaintiff Votivo, Ltd. ("Plaintiff") on all of its causes of action against Defendant Mine Design ("Defendant"). Final Judgment was entered after Defendant (1) failed to appear at a November 22, 2004 Scheduling Conference, (2) failed to appear at a scheduled hearing on its own Motion to Set Aside Default, and (3) failed to offer a reasonable explanation for its nonappearance at the two mandatory hearings.

60

During this litigation, Defendant claimed that, on advice of its legal adviser, it believed it was not required to attend the November 22, 2004 Scheduling Conference without receiving court documentation. (Defendant's May 2, 2005 Motion to Set Aside Default ("Motion to Set Aside Default"), lines 2-3). Due to Defendant's failure to attend or otherwise have representation present at the Scheduling Conference, this Court struck Defendant's Answer and entered default against Defendant.

On May 31, 2005, the following motions were set for hearing: (1) Defendant's Motion to Set Aside Default, and (2) Plaintiff's Motion for Default Judgment ("May 31, 2005 Hearing"). At the May 31, 2005 Hearing, Defendant again failed to make an appearance or otherwise have representation present. As such, this Court denied Defendant's Motion to Set Aside Default, and stated that it would grant Plaintiff's Motion for Default Judgment upon the submission of additional evidence to support Plaintiff's request for attorneys' fees and punitive damages.

On June 20, 2005, Plaintiff renewed its motion for default judgment. Then, two days before the scheduled hearing date for the renewed motion for default judgment, Defendant filed a second Motion to Set Aside Default. Defendant's second Motion to Set Aside Default failed to provide any explanation for Defendant's failure to appear at the prior May 31, 2005 Hearing. "Thus, after consideration of Defendant's disregard for procedure and scarce judicial resources, this Court [found] that Defendant ha[d] failed to meet its burden of good cause, and accordingly denie[d] Defendant's [second] Motion to Set Aside Default." (July 15, 2005 Order Granting Plaintiff's Continued Motion for Entry

1 of Default and Denying Defendant's Cross-Motion to Set Aside Default, at 5:19-  
2 22 ("July 15, 2005 Order"))<sup>1</sup>.

3 On July 15, 2005, this Court granted Plaintiff's renewed motion for  
4 default judgment and ordered, in relevant part, as follows:

5 (1) Defendant, its respective agents, representatives,  
6 and employees, are permanently enjoined from  
7 infringing Votivo's "Red Currant" and "Soku  
8 Lime" trademarks, and any and all other  
9 trademarks owned by Votivo;

10 (2) Defendant is to pay Plaintiff attorney's fees in  
11 the amount of \$19,800; and

12 (3) Plaintiff is awarded costs.

13 (July 15, 2005 Order, at 13:11-20). Final Judgment was then entered on  
14 November 7, 2005.

15 Presently before the Court is Defendant's FRCP 59(e) Motion to  
16 modify or amend the Final Judgment ("Motion"). For the reasons discussed  
17 below, Defendant's Motion is denied.

18 **A. Factual Summary**

19 Plaintiff initiated the instant action against Defendant for: (1)  
20 Trademark Infringement; (2) Violation of Lanham Act Section 43(a); (3) Violation  
21 of California Business and Professions Code Section 17200 et seq.; (4) Common  
22 Law Unfair Competition; and (5) Common Law Trademark Infringement.

23 The following facts are alleged in the Complaint:  
24  
25

---

26 <sup>1</sup>This Court's July 15, 2005 Order was filed on July 15, 2005 and entered on  
27 July 21, 2005.

1 On May 20, 2003, Plaintiff obtained United States Trademark  
2 Registration No. 2,717,256, and No. 2,717,257 to protect its "Soku Lime" mark  
3 for use with skin soap, scented body spray, scented room spray, incense, candles,  
4 and tapers. (Complaint, ¶¶ 16-17). SCANNED

5 On June 3, 2003, Plaintiff obtained United States Trademark  
6 Registration No. 2,720,906 and 2,720,907 to protect its "Red Currant" mark for  
7 use with skin soap, scented body spray, scented room spray, incense, candles, and  
8 tapers. (*Id.* at ¶18-19). The "Soku Lime" and "Red Currant" marks are hereinafter  
9 collectively called, the "Trademarks."

10 From August 10, 2003 through August 14, 2003, representatives of  
11 Plaintiff attended the New York International Gift Show in New York City  
12 ("Show"). (*Id.* at ¶ 20). While attending the Show, Plaintiff's representatives  
13 discovered that Defendant was infringing upon the above referenced Trademarks  
14 by selling scented candles and other products using the Trademarks. (*Id.* at ¶ 20).

15 On August 11, 2003, Plaintiff's counsel sent a cease and desist letter  
16 to Defendant, explaining that Defendant was infringing upon the above-referenced  
17 Trademarks, and demanding that Defendant immediately cease and desist from the  
18 further marketing or sale of products using the Trademarks. (*Id.* at ¶ 21).  
19 Defendant never responded to Plaintiff's August 11, 2003 letter, and Defendant  
20 continues to infringe the Votivo Trademarks. (*Id.* at ¶ 21-24).

21 **B. Procedural Summary**

22 On August 22, 2003, Plaintiff filed the Complaint.

23 On January 29, 2004, this Court ordered Plaintiff to show cause in  
24 writing why this action should not be dismissed for lack of prosecution (the  
25 "OSC"). The OSC was withdrawn by this court on March 15, 2004.

26 On July 14, 2004, Defendant filed its Answer to the Complaint.

1 On November 22, 2004, this Court held a Rule 16(b) Scheduling  
2 Conference. Counsel for Plaintiff made an appearance, but no appearance was  
3 made on behalf of Defendant. The Court therefore struck Defendant's Answer and  
4 entered default for failure to appear at a regularly scheduled hearing.

5 On May 2, 2005, Defendant filed a Motion to Set Aside Default,  
6 which was scheduled to be heard on May 31, 2005.

7 On May 9, 2005, Plaintiff filed a Motion for Entry of Default  
8 Judgment, which was also scheduled for hearing on March 31, 2005.

9 On May 31, 2005, Defendant again failed appear at a scheduled  
10 hearing, and this Court denied Defendant's Motion to Set Aside Default.  
11 Additionally, the Court denied without prejudice Plaintiff's Motion for Entry of  
12 Default Judgment, which requested an injunction. The Court stated that it would  
13 enter the permanent injunctive relief sought by Plaintiff, but requested that  
14 Plaintiff submit additional briefing to support its requests for an award of  
15 attorney's fees and for an award of punitive damages.

16 On June 20, 2005, Plaintiff filed a Continued Motion for Entry of  
17 Default Judgment, which was granted.

18 On July, 7 2005, Defendant filed a Notice of Cross-Motion and  
19 Motion to Set Aside Default, which was denied.

20 On November 7, 2005, this Court issued an order permanently  
21 enjoining and restraining Defendants from using the term "Red Curreant" or any  
22 other term, symbol name that is confusingly similar to the term "Red Curreant."

23 Also on this date, this Court entered Final Judgment in favor of  
24 Plaintiff and against Defendant. This Court awarded Plaintiff attorneys' fees in  
25 favor in of Plaintiff the amount of \$19,800.00.

On November 22, 2005, Defendant filed a FRCP 59(e) Motion to modify or amend Final Judgment, which is before the Court.

## II. Discussion

### A. Standard For Rule 59(e) Motion To Alter Or Amend Final Judgement

District courts have power to alter or amend a final judgment by motion under Rule 59(e). Fed. R. Civ. P. 59(e). The rule also has been interpreted as permitting a motion to vacate a judgment rather than merely amend it. Foman v. Davis, 371 U.S. 178 (1962). The motion must be filed no later than 10 days after entry of the judgment, and seek a substantive change that would result in a substantive alteration of the judgment rather than just a clerical correction or change in a purely procedural matter. Fed. R. Civ. P. 59(e); Britton v. Swift Transp. Co., Inc., 127 F.3d 616, 618 (7th Cir. 1997); United States v. 47 West 644 Route 38, Maple Park, Ill., 190 F.3d 781, 782 (7th Cir. 1999). Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000).

Rule 59(e) does not set forth any specific grounds for relief, but generally, a motion will lie where: 1) there is newly discovered evidence; 2) the district court committed clear error or its initial decision was manifestly unjust; or 3) there is an intervening change in the controlling law. School Dist. No. 1J, Multnomah County v. AC and S, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). This showing is a "high hurdle." Weeks v. Bayer, 246 F.3d 1231, 1236 (9th Cir. 2001). A judgment is not properly reopened "absent highly unusual circumstances." Id. A motion to alter or amend a judgment may not be used merely to reconsider factual or legal arguments that were or could have been raised prior to entry of

1 judgment. Zimmerman v. City of Oakland, 255 F.3d 734 (9th Cir. 2001) (motion  
2 to alter or amend judgment properly denied because it repeated legal arguments  
3 that had been made before and sought to introduce previously available facts).

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4 **B. Analysis<sup>2</sup>**

5 **1. Defendant's Motion Is Properly Before This Court**

6 As a preliminary matter, this Court addresses whether the present  
7 Motion is procedurally proper. According to Plaintiff, Defendant's Motion is  
8 improperly brought under Rule 59(e) because the only remedy available to a  
9 defendant who has a default judgment entered against it is a motion to set aside  
10 default judgment under Rule 60(b). However, this Court disagrees with Plaintiff.

11 “[A]ny motion to amend a judgment served within ten days after the  
12 entry of judgment, except for a proper Rule 60(a) motion to correct purely clerical  
13 errors, is to be considered a Rule 59(e) motion.” U.S. v. One 1988 Dodge  
14 Pickup, 959 F.2d 37, 40 (5th Cir. 1992) (quoting Willie v. Continental, 784 F.2d  
15 706, 707 (5th Cir. 1986) (en banc). “No exception is made or suggested for  
16 default judgments. To countenance such an exception would undermine the

17  
18 <sup>2</sup>Defendant requests judicial notice of fifty (50) documents in support of its  
19 Motion. For the reasons discussed below, Defendants's request is denied.

20 A court must take judicial notice if a party requests it and supplies the court  
21 with the requisite information. Fed. R. Evid. 201(d). “A judicially noticed fact  
22 must be one not subject to reasonable dispute in that it is either (1) generally  
23 known within the territorial jurisdiction of the trial court or (2) capable of accurate  
and ready determination by resort to sources whose accuracy cannot reasonably be  
questioned.” Fed. R. Evid. 201(b).

24 Defendant fails to provide the requisite information for this Court to take  
25 judicial notice of the fifty documents submitted in support of Defendant's Motion.  
26 This Court is not required to sift through Plaintiff's documents to determine which  
27 documents, if any, satisfy the standard for judicial notice. The burden is  
appropriately placed on the party requesting judicial notice. Fed. R. Evid. 201(d).  
Therefore, this Court denies Defendant's request for judicial notice.

1 central rationale . . . to create a uniform 'brightline rule.'" Id. (quoting Harcon  
2 Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 670 (5th Cir.) (en banc),  
3 cert. denied, 479 U.S. 930 (1986).

4 Defendant filed its Motion within 10 court days of the entry of Final  
5 Judgment.<sup>3</sup> As such, Defendant's Motion is properly before this Court.

6 **2. Considering The Totality Of The Circumstances, Altering**  
7 **Or Amending Final Judgment In This Matter Is Not**  
8 **Warranted Under Rule 59(e)**

9 Defendant argues that its Motion to alter or amend Final Judgment  
10 pursuant to Rule 59(e) should be granted because this Court committed clear error  
11 by: (1) Entering default judgment where Plaintiff's allegations, even if taken as  
12 true, failed to state a valid claim for trademark infringement; (2) Finding that  
13 Plaintiff's liability was established by its default; and (3) Awarding attorney's fees  
14 where this action is not an "exceptional case" under 17 U.S.C. § 1117.  
15 Defendant's arguments are unpersuasive.

16 Defendant's first contention that the allegations in Plaintiff's  
17 Complaint are inadequate to plead a cause of action for trademark infringement is  
18 unconvincing. A claim for trademark infringement requires a plaintiff to plead  
19 only the following: (1) the existence of protectable trademark rights; (2) conduct  
20 by a defendant that causes a likelihood of confusion; and (3) resulting harm. See  
21 15 U.S.C. § 114. Plaintiff's Complaint appropriately pleads such elements (see  
22

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23 <sup>3</sup>Rule 59(e) provides that "[a]ny motion to alter or amend a judgment shall  
24 be filed no later than 10 days after entry of the judgment." Computation of the 10  
25 day period excludes "intermediate Saturdays, Sundays and legal holidays." Fed. R.  
26 Civ. P. 6. Final Judgment was entered on November 7, 2005, and thus, the filing  
27 deadline for a Rule 59(e) motion was November 22, 2005, the date Defendant filed  
28 the instant Motion.

1 Complaint, ¶¶ 27-33), and thus, vacating Final Judgment is not warranted on this  
2 ground.

3 Defendant's second argument that its liability is not established by  
4 default is equally unpersuasive.<sup>4</sup> As noted in this Court's July 15, 2005 Order  
5 granting default judgment, if the court determines that a defendant is in default,  
6 the defendant's liability is collectively established and the factual allegations in  
7 the complaint, except those relating to damages, are accepted as true. See Geddes  
8 v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977). Since this Court  
9 found that Defendant was in default, the factual allegations in Plaintiff's  
10 Complaint were deemed admitted, and as such, this Court appropriately  
11 determined that the facts as set forth in the Complaint established Defendant's  
12 liability to Plaintiff for 1) federal trademark infringement, 2) violation of Lanham  
13 Act Section 43(a), 3) violation of California Business and Professions Code §  
14 17200 et seq., 4) common law trademark infringement, and 5) common law unfair  
15 competition. Contrary to Defendant's contentions, Defendant's liability is  
16 established by its default.

17 This Court also rejects Defendant's final contention that the fee award  
18 should be reconsidered. Defendant fails to address how this Court's award of  
19 attorney's fees is manifestly unjust or made in clear error. Defendant appears to  
20

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21 \*Defendant attempts to belatedly litigate the merits of this case by arguing  
22 that Red Currant is "merely descriptive," and therefore cannot have trademark  
23 protection. To consider Defendant's argument at this late stage of litigation, after  
24 Final Judgment has been entered, and after Defendant has had a full and fair  
25 opportunity to timely bring its contentions during the pendency of this action,  
26 would needlessly waste valuable judicial resources and encourage parties to  
27 unreasonably delay and neglect their obligations to this Court to adjudicate matters  
28 pursuant to well established Court rules. Under the facts of this case, allowing  
Defendant to argue issues after the close of litigation is unjustified and  
inappropriate.

1 argue that Plaintiff initiated this litigation in bad faith, and as such, it is Defendant  
2 who should be awarded attorneys' fees. (See Mennen Co. v. Gillette Co., 565 F.  
3 Supp. 648 (S.D.N.Y. 1983), aff'd, 742 F. 2d 1437 (2d Cir. 1984) (awarding the  
4 defendant attorney's fees because the plaintiff's claims had no real substance and  
5 suit was initiated as a competitive ploy); Universal City Studios, Inc. v. Nintendo  
6 Co. Ltd., 615 F. Supp. 838, 864 (D.C.N.Y. 1985) (awarding attorney's fees  
7 pursuant to 17 U.S.C. § 1117 because the suit was initiated in bad faith and  
8 designed to serve ulterior business motives). Defendant, however, does not  
9 demonstrate that Plaintiff initiated this action in bad faith or to serve an improper  
10 motive. Moreover, Defendant fails to articulate why this case cannot be  
11 considered "exceptional" for purposes of awarding attorneys' fees under 17 U.S.C.  
12 § 1117. Under such facts, revisiting the issue of attorneys' fees is not warranted.

13 As the Ninth Circuit has held, a judgment is not properly reopened  
14 "absent highly unusual circumstances." Weeks v. Bayer, 246 F.3d 1231, 1236  
15 (9th Cir. 2001). This case presents no such unusual circumstances. Defendant's  
16 Motion is essentially a third motion to set aside default to "rescue [itself] from the  
17 consequences of [its] own choices" in unreasonably failing to timely defend this  
18 action. Zarcone v. United States, 2004 WL 2196560, at \*1, \*2 (N.D. Cal. 2004).  
19 The record reflects that Defendant had ample opportunity to litigate or otherwise  
20 defend this action, yet it failed to do so. As such, Defendant's attempt to litigate  
21 the merits of this case now is not well taken. There are no appropriate grounds to  
22 alter, amend or vacate Final Judgment, and thus, Defendant's Motion is  
23 accordingly denied.

1 **III. Conclusion**

2 Based on the foregoing discussion, this Court **DENIES** Defendant's  
3 F.R.C.P. 59(e) Motion to alter or amend Final Judgment in this matter.

4  
5 IT IS SO ORDERED.

6  
7 DATED: DEC 27 2005

DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge  
United States District Court

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# **EXHIBIT 8**

FILED

2006 JAN 26 PM 3:00

CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES

Carlos Candeloro, Esq.  
4724 Kester Ave. #205  
Sherman Oaks, CA 91403  
California State Bar No. 194716  
(818) 995 6766 (tel.)  
carlos@candeloro.net

Attorney for Defendant/Appellant

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

No.

Dist. Ct. No. CV- 03-6017-DT (Ex)

Votivo Ltd.,

Plaintiff/Appellee,

v.

Mine Design,

Defendant/Appellant.

**NOTICE OF APPEAL TO THE  
UNITED STATES COURT OF  
APPEALS FOR THE NINTH  
CIRCUIT**

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MINE DESIGN'S NOTICE OF APPEAL

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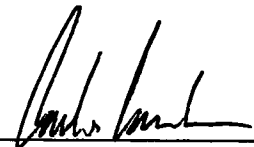
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Certificate of Service

This is to certify that on January 26, 2006, a true and correct copy of the foregoing **NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**, in the appeal from D.C. No. CV- 03-6017-DT (Ex)(C.D. Cal. Los Angeles), was served by United States Mail, first class, on counsel of record for all parties to the action below in this matter, as follows:

For plaintiff Votivo, Ltd.:

Gregory P. Goonan, Esq.  
The Affinity Law Group APC  
600 West Broadway, Suite 2800  
San Diego, California 92101

  
\_\_\_\_\_  
Carlos Candeloro  
Attorney at Law

# EXHIBIT 9

1 Stephen R. Pappas, Esq.  
2 550 South California Avenue, Suite 320  
3 Palo Alto, California 94306  
4 California State Bar No. 158560  
5 (650)858-8400 (tel.)  
6 (650)858-8508 (fax)  
7 steve@stephenpappas.com

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 VOTIVO, Ltd., a Washington corporation,

11 Plaintiff,

12 v.

13 AMAL FLORES D.B.A. MINE DESIGN, a sole  
14 proprietorship and DOES 1 through 20,

15 Defendants.

NO.

VERIFIED COMPLAINT FOR:

(1) FEDERAL TRADEMARK  
INFRINGEMENT 15 U.S.C. §1114;

(2) VIOLATION OF LANHAM  
ACT, 15 U.S.C. §§1125(a);

(3) VIOLATION OF  
CALIFORNIA BUSINESS AND  
PROFESSIONS CODE SECTION  
17200;

(4) COMMON LAW  
TRADEMARK INFRINGEMENT;  
AND

(5) COMMON LAW UNFAIR  
COMPETITION

**JURY TRIAL DEMANDED**

16 Plaintiff VOTIVO, Ltd. ("VOTIVO"), complains and alleges as follows:  
17  
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23

## **I. INTRODUCTION.**

1.1 This matter is about trademark infringement and unfair competition by Defendant against VOTIVO. VOTIVO brings this action to secure relief under Federal and California law. VOTIVO seeks: (a) a temporary, preliminary and permanent injunction prohibiting Defendant from further infringement of the VOTIVO Trademarks; (b) an order requiring the seizure and impoundment of all infringing products in Defendant's possession, custody or control pending completion of this action; and (c) money damages for Defendant's past and continuing infringement of the VOTIVO Trademarks.

## **II. THE PARTIES.**

2.1 Plaintiff. Plaintiff VOTIVO is a corporation duly organized and existing under the laws of the state of Washington with its principal place of business in Seattle, Washington. VOTIVO is in good standing with the Washington Secretary of State's Office has done all things necessary and proper to bring this lawsuit.

2.2 Defendant. Based on information and belief, Defendant Amal Flores is an individual doing business as Mine Design with his principal place of business in Beverly Hills, California.

2.3 The true names and capacities, whether individual, corporate or otherwise, of Defendant DOES 1 through 20, inclusive, are unknown to Plaintiff at this time. Therefore, Plaintiff sues these defendants by fictitious names pursuant to §474 of the California Code of Civil Procedure. Plaintiff will seek leave of the Court to amend his complaint to set forth the true names of the defendants when the same have been ascertained. Plaintiff is informed and believes, and on that basis alleges, that except where otherwise expressly alleged to the contrary, each of the defendants, including Does 1 through 20, inclusive, is, and at all relevant times herein mentioned was, the agent, partner, joint venturer, employee, and/or coconspirator of the remaining defendants and is, and at all relevant times herein mentioned

1 was, in performing and failing to perform the acts and conduct hereinafter alleged, acting  
2 within the course and scope of such agency, partnership, joint venture, employment and/or  
3 conspiracy. Plaintiff is further informed and believes, and on that basis alleges, that the acts  
4 and conduct of each of the defendants were known to, and authorized and ratified by, the  
5 remaining defendants, and that each of the defendants is legally responsible for the conduct  
6 and damages alleged.

### 7 **III. JURISDICTION AND VENUE.**

8 3.1 This Court has jurisdiction over Count I under 15 U.S.C. §1121(a) and 28  
9 U.S.C. §§1331, 1338(a) in that this case arises under the Trademark Laws of the United  
10 States, 15 U.S.C. §§1051-1127.

11 3.2 This Court has jurisdiction over Count II under 15 U.S.C. §1121(a) and 28  
12 U.S.C. §§1331, 1338(b) in that this case contains claims for unfair competition joined  
13 with claims under the Trademark Laws of the United States, 15 U.S.C. §§1051-1127.

14 3.3 This Court has jurisdiction over Counts III-V under 28 U.S.C. §1338(b) in  
15 accordance with the principles of pendant jurisdiction in that said claims are joined with  
16 substantial and related claims under the Trademarks Laws of the United States, 15 U.S.C.  
17 §§1051-1127.

18 3.4 Venue is proper in this district pursuant to 28 U.S.C. §1391(b).

### 19 **IV. FACTUAL BACKGROUND.**

#### 20 **VOTIVO's Trademark Rights.**

21 4.1 VOTIVO is one of the country's leading manufacturers and distributors of  
22 designer aromatic products for the home décor, gift and personal care industries. Among  
23 the many products sold by VOTIVO are candles, burning sticks and incense, scented  
room sprays, skin soaps, and scented body sprays. Since at least as early as 1996,  
VOTIVO has used a variety of distinctive trademarks to advertise and promote its  
aromatic products.

1           4.2    VOTIVO's family of trademarks is distinctive when applied to VOTIVO's  
2 aromatic products. Because of the excellent sales and extensive promotion of VOTIVO's  
3 products, VOTIVO's family of trademarks have become well known to consumers and  
4 others in the home décor, gift and personal care industries as identifying unique and  
5 desirable aromatic products of the highest quality that originate with VOTIVO.

6           4.3    Consequently, VOTIVO's trademarks are very important and valuable  
7 business assets of VOTIVO, and represent significant business goodwill.

8           4.4    Among the distinctive and valuable trademarks owned and used by  
9 VOTIVO are the trademarks RED CURRANT and TALL GRASS (collectively the "VOTIVO  
10 Trademarks").

11           4.5    VOTIVO owns United States Trademark Registration Nos. 2,720,906 and  
12 2,720, 907 for RED CURRANT and United States Trademark Registration Nos. 2,717,259  
13 and 2,717,258 for TALL GRASS (collectively the "VOTIVO Trademarks"). The VOTIVO  
14 Trademark Registrations protect the RED CURRANT trademark and the TALL GRASS  
15 trademark in connection with the following goods: candles, tapers, skin soap, scented  
16 body spray, scented room spray and incense.

17           4.6    VOTIVO began using the VOTIVO Trademarks in association with the  
18 promotion and sale of candles, tapers, incense, skin soap, scented body spray and scented  
19 room spray since at least as early as January 1998, has used the VOTIVO Trademarks in  
20 such manner at all times relevant to the allegations of this complaint, and continues to use  
21 the VOTIVO Trademarks in such manner on a continuous basis to the present.

22           4.7    VOTIVO has used the VOTIVO Trademarks extensively in print  
23 advertisements, brochures and other printed marketing materials and on the Internet.  
VOTIVO also has sold a significant amount of products to distributors and consumers  
using the VOTIVO Trademarks.

          4.8    As a result of VOTIVO's extensive promotion and use of the VOTIVO

1 Trademarks and the substantial amount of sales accomplished by VOTIVO of products  
2 bearing the VOTIVO Trademarks, the VOTIVO Trademarks have become well-known in  
3 the home décor, gift and the personal care industries as signifying unique and desirable  
4 aromatic products of the highest quality that originate with VOTIVO.

5 4.9 Through the use of the VOTIVO Trademarks, VOTIVO has generated  
6 substantial business goodwill for and from the VOTIVO Trademarks and the VOTIVO  
7 Trademarks have become important and valuable business assets for VOTIVO.

8 4.10 On May 20, 2003, VOTIVO obtained United States Trademark  
9 Registration No. 2,717,258 to protect the TALL GRASS trademark for use in association  
10 with candles and tapers. United States Trademark Registration No. 2,717,258 has been  
11 valid and subsisting at all relevant times. A true and correct copy of the registration  
12 certificate for United States Trademark Registration No. 2,717,258 is attached hereto as  
13 Exhibit 1.

14 4.11 On May 20, 2003, VOTIVO obtained United States Trademark  
15 Registration No. 2,717,259 to protect the TALL GRASS trademark for use in association  
16 with skin soap, scented body spray, scented room spray and incense. United States  
17 Trademark Registration No. 2,717,259 has been valid and subsisting at all relevant times.  
18 A true and correct copy of the registration certificate for United States Trademark  
19 Registration No. 2,717,259 is attached hereto as Exhibit 2.

20 4.12 On June 3, 2003, VOTIVO obtained United States Trademark Registration  
21 No. 2,720,907 to protect the RED CURRANT trademark for use in association with candles  
22 and tapers. United States Trademark Registration No. 2,720,907 has been valid and  
23 subsisting at all relevant times. A true and correct copy of the registration certificate for  
United States Trademark Registration No, 2,720,907 is attached hereto as Exhibit 3.

4.13 On June 3, 2003, VOTIVO obtained United States Trademark Registration  
No. 2,720,906 to protect the RED CURRANT trademark for use in association with skin

1 soap, scented body spray, scented room spray and incense. United States Trademark  
2 Registration No. 2,720,906 has been valid and subsisting at all relevant times. A true and  
3 correct copy of the registration certificate for United States Trademark Registration No.  
4 2,720,906 is attached hereto as **Exhibit 4**.

**Defendant's Wrongful Acts.**

5 4.14 On January 30, 2005, representatives of VOTIVO attended the New York  
6 International Gift Show (the "New York Show") in New York City. During the New  
7 York Show, VOTIVO discovered that Defendant was selling scented candles and other  
8 products using the VOTIVO Trademarks and/or other terms that are confusingly similar  
9 to the VOTIVO Trademarks, i.e., by using the terms "Currant (Red)" and "Tall Grass" to  
10 market, advertise, and sell Defendant's products in a manner that was likely to cause  
11 confusion among the public as to the VOTIVO Trademarks.

12 4.15 Defendant continues to advertise, market and sell candles and, on  
13 information and belief, other aromatic products in the home decor, gift, and/or personal  
14 care industry using the terms "Currant (Red)" and "Tall Grass," terms that are  
15 confusingly similar to the VOTIVO Trademarks. In doing so, Defendant has infringed,  
and continues to infringe, VOTIVO's trademark rights.

16 **V. FIRST CAUSE OF ACTION**  
17 **FEDERAL TRADEMARK INFRINGEMENT.**  
(15 U.S.C. §1114)

18 5.1 VOTIVO realleges and incorporates herein by reference the allegations  
19 contained in paragraphs 1.1 through 4.15 of this Complaint as part of this cause of action.

20 5.2 VOTIVO holds four valid and existing federal registrations for the  
21 VOTIVO Trademarks. VOTIVO has marketed, advertised and sold candles, tapers, skin  
22 soap, scented body spray, scented room spray, incense and other aromatic products to the  
23 home décor, gift and personal care industries since at least as early as 1998 using the  
VOTIVO Trademarks.

1           5.3 Defendant has marketed, advertised and sold, and continues to market,  
2 advertise and sell, candles and other aromatic products to the home décor, gift and  
3 personal care industries using the VOTIVO Trademarks and/or trademarks confusingly  
4 similar to the VOTIVO Trademarks.

5           5.4 Defendant's activities and wrongful use of the VOTIVO Trademarks as  
6 alleged herein have caused, and are likely to continue to cause, confusion in the minds of  
7 public to the detriment of VOTIVO.

8           5.5 Defendant's use of the VOTIVO Trademarks as alleged herein, and  
9 marketing, advertising and sale of products using the VOTIVO Trademarks, was done  
10 without the knowledge, consent or permission of VOTIVO and continues without the  
11 consent or permission of VOTIVO.

12           5.6 Defendant has violated the trademark rights of VOTIVO under the  
13 Trademark Act, thereby giving rise to, a cause of action under 15 U.S.C. § 1114.

14           5.7 VOTIVO will be irreparably harmed unless Defendant is temporarily,  
15 immediately and permanently enjoined from any further use of the VOTIVO Trademarks  
16 and any further marketing, advertising or sale of products using the VOTIVO  
17 Trademarks.

18           5.8 VOTIVO has no adequate remedy at law and serious damage to its  
19 trademark rights will result unless Defendant's wrongful use of the VOTIVO Trademarks  
20 is enjoined by the court.

21           5.9 VOTIVO also is entitled to an order requiring the impoundment of all  
22 infringing products and materials pending the trial of this matter, and the destruction of  
23 all infringing products and materials following trial.

          5.10 Defendant has continued to use the VOTIVO Trademarks notwithstanding  
that it has actual knowledge of VOTIVO's superior trademark rights as alleged herein.  
Defendant's infringement of the VOTIVO Trademarks accordingly constitutes intentional,

1 willful, knowing and deliberate trademark infringement.

2 5.11 Defendant's infringement of the VOTIVO Trademarks as alleged herein  
3 has caused, and will continue to cause, VOTIVO to suffer damages in an amount  
4 unknown at this time and has caused, and will continue to cause, Defendant to gain  
5 revenues and profit in an amount unknown at this time. Pursuant to 15 U.S.C. § 1117(a).  
6 VOTIVO is entitled to an award of monetary damages in an amount equal to the losses  
7 suffered by VOTIVO and the revenues and/or profits gained by Defendant, which  
8 damages should be augmented as provided by 15 U.S.C. §1117(a).

9 5.12 Pursuant to 15 U.S.C. § 1117(a), any monetary damages awarded to  
10 VOTIVO should be trebled.

11 5.13 Pursuant to 15 U.S.C. § 1117(a), VOTIVO is entitled to an award of  
12 attorneys fees and costs of suit.

13 **VI. SECOND CAUSE OF ACTION**  
**VIOLATION OF LANHAM ACT SECTION 43(A).**  
14 15 U.S.C. §1125(a)

15 6.1 VOTIVO realleges and incorporates herein by reference the allegations  
16 contained in paragraphs 1.1 through 5.13 of this Complaint as part of this cause of action.

17 6.2 The actions of Defendant as alleged herein constitute unfair competition and  
18 false advertising in violation of the Lanham Act Section 43(a).

19 6.3 VOTIVO will be irreparably harmed unless Defendant is temporarily,  
20 immediately and permanently enjoined from any further use of the VOTIVO Trademarks  
21 and any further marketing, advertising or sale of products using the VOTIVO  
22 Trademarks.

23 6.4 VOTIVO has no adequate remedy at law and serious damage to its  
trademark rights will result unless Defendant's wrongful use of the VOTIVO Trademarks  
is enjoined by the court.

1           6.5    VOTIVO also is entitled to an order requiring the impoundment of all  
2    infringing products and materials pending the trial of this matter, and the destruction of  
3    all infringing products and materials following trial.

4           6.6    The actions of Defendant as alleged herein constitute intentional, willful,  
5    knowing and deliberate unfair competition and false advertising pursuant to Lanham Act  
6    Section 43(a).

7           6.7    Defendant's acts of unfair competition and false advertising in violation of  
8    the Lanham Act Section 43(a) as alleged herein have caused, and will continue to cause,  
9    VOTIVO to suffer damages in an amount unknown at this time and have caused, and will  
10   continue to cause Defendant to gain revenues and profit in an amount unknown at this  
11   time. Pursuant to 15 U.S.C. §1117(a), VOTIVO is entitled to an award of monetary  
12   damages in an amount equal to the losses suffered by VOTIVO and the revenues and/or  
13   profits gained by Defendant, which damages should be augmented as provided by 15  
14   U.S.C. §1117(a).

15          6.8    Pursuant to 15 U.S.C. §1117(a), any monetary damages awarded to  
16   VOTIVO should be trebled.

17          6.9    Pursuant to 15 U.S.C. §1117(a), VOTIVO is entitled to an award of  
18   attorneys fees and costs of suit.

## 19                               **VII. THIRD CAUSE OF ACTION.**

20                           (Violation of California B&P Code Section 17200 *et seq.*)

21          7.1    VOTIVO realleges and incorporates herein by reference the allegations  
22   contained in paragraphs 1.1 through 6.9 of this Complaint as part of this cause of action.

23          7.2    The actions of Defendant as alleged herein constitute unfair competition and  
false advertising in violation of California Business and Professions Code section 17200  
*et seq.*

1           7.3    VOTIVO will be irreparably harmed unless Defendant is enjoined from  
2 any further use of the VOTIVO Trademarks, from any further marketing, advertising and  
3 sale of products using the VOTIVO Trademarks, and from any further acts of unfair  
4 competition and false advertising relating to the VOTIVO Trademarks.

5           7.4    VOTIVO has no adequate remedy at law and serious damage to its rights  
6 will result unless the Defendant's wrongful use of the VOTIVO Trademarks is enjoined  
7 by the court.

8           7.5    The actions of Defendant as alleged herein constitute intentional, willful,  
9 knowing and deliberate unfair competition and false advertising.

10          7.6    Defendant's acts of unfair competition and false advertising have caused  
11 the Defendant to gain revenues and profit in an amount unknown at this time. Pursuant  
12 to California Business & Professions Code section 17203, VOTIVO is entitled to a  
13 disgorgement in an amount equal to the revenues and/or profits gained by Defendant.

14                   **VIII. FOURTH CLAIM FOR RELIEF.**  
15                    (Common Law Trademark Infringement)

16          8.1    VOTIVO realleges and incorporates herein by reference the allegations  
17 contained in paragraphs 1.1 through 7.6 of this Complaint as part of this cause of action.

18          8.2    The actions of Defendant as alleged herein constitute common law  
19 trademark infringement.

20          8.3    VOTIVO will be irreparably harmed unless Defendant is temporarily,  
21 immediately and permanently enjoined from any further use of the VOTIVO Trademarks  
22 and any further marketing, advertising or sale of products using the VOTIVO  
23 Trademarks.

          8.4    VOTIVO has no adequate remedy at law and serious damage to its  
trademark rights will result unless Defendant's wrongful use of the VOTIVO Trademarks  
is enjoined by the court.

1           8.5    VOTIVO also is entitled to an order requiring the impoundment of all  
2    infringing products and materials pending the trial of this matter, and the destruction of  
3    all infringing products and materials following trial.

4           8.6    Defendant has continued to use the VOTIVO Trademarks notwithstanding  
5    that it has actual knowledge of VOTIVO's superior trademark rights as alleged herein.  
6    Defendant's infringement of the VOTIVO Trademarks accordingly constitutes  
7    intentional, willful, knowing and deliberate trademark infringement.

8           8.7    Defendant's infringement of the VOTIVO Trademarks as alleged herein  
9    has caused, and will continue to cause, VOTIVO to suffer damages in an amount  
10   unknown at this time and has caused, and will continue to cause, Defendant to gain  
11   revenues and profit in an amount unknown at this time. VOTIVO is entitled to an award  
12   of monetary damages in an amount equal to the losses suffered by VOTIVO and the  
13   revenues and/or profits gained by Defendant.

14          8.8    Defendant committed the acts of trademark infringement alleged herein  
15   intentionally, deliberately, maliciously, with intent to injure and oppress VOTIVO and in  
16   conscious disregard of the rights of VOTIVO. VOTIVO accordingly is entitled to an  
17   award of punitive and exemplary damages in an amount sufficient to punish and deter  
18   Defendant and make it an example to others.

19                           **IX. FIFTH CLAIM FOR RELIEF.**  
20                            (Common Law Unfair Competition)

21          9.1    VOTIVO realleges and incorporates herein by reference the allegations  
22   contained in paragraphs 1.1 through 8.8 of this Complaint as part of this cause of action.

23          9.2    The actions of Defendant as alleged herein constitute common law unfair  
24   competition.

25          9.3    VOTIVO will be irreparably harmed unless Defendant is temporarily,  
26   immediately and permanently enjoined from any further use of the VOTIVO Trademarks,

1 any further marketing, advertising or sale of products using the VOTIVO Trademarks,  
2 and any further acts of unfair competition and false advertising.

3 9.4 VOTIVO has no adequate remedy at law and serious damage to its rights  
4 will result unless Defendant's wrongful use of the VOTIVO Trademarks is enjoined by  
5 the court.

6 9.5 VOTIVO also is entitled to an order requiring the impoundment of all  
7 infringing products and materials pending the trial of this matter, and the destruction of  
8 all infringing products and materials following trial.

9 9.6 Defendant's acts of unfair competition and false advertising as alleged  
10 herein have caused, and will continue to cause, VOTIVO to suffer damages in an amount  
11 unknown at this time and have caused, and will continue to cause, Defendant to gain  
12 revenues and profit in an amount unknown at this time. VOTIVO is entitled to an award  
13 of monetary damages in an amount equal to the losses suffered by VOTIVO and the  
14 revenues and/or profits gained by Defendant.

15 9.7 Defendant committed the acts of unfair competition and false advertising  
16 alleged herein intentionally, deliberately, maliciously, with intent to injure and oppress  
17 VOTIVO and in conscious disregard of the rights of VOTIVO. VOTIVO accordingly is  
18 entitled to an award of punitive and exemplary damages in an amount sufficient to punish  
19 and deter Defendant and make it an example to others.

#### 18 **PRAYER FOR RELIEF.**

19 WHEREFORE, VOTIVO prays for relief against Defendant as follows:

20 1. For a temporary, preliminary and permanent injunction restraining and  
21 enjoining Defendant, and its agents, servants, employees, and all others in active concert  
22 or participation with it, as follows:

23 a. From further using the VOTIVO Trademarks, and any packaging

1 and advertising and promotional materials containing the VOTIVO Trademarks,  
2 in any way or manner whatsoever;

3 b. From further infringing VOTIVO's trademark rights;

4 c. From further advertising, promoting, distributing, offering for sale,  
5 and/or selling any products using the VOTIVO Trademarks or any mark  
6 confusingly similar with the VOTIVO Trademarks; and

7 d. From further acts of false advertising and unfair competition as  
8 alleged herein.

9 2. For an order requiring the impoundment of all infringing products and  
10 materials pending the trial of this matter, and the destruction of all infringing products  
11 and materials following trial.

12 3. For an award of damages suffered by VOTIVO in the sum of \$75,000.00  
13 or such further amounts as may be proven at trial, plus any revenues or profits earned by  
14 Defendant as a result of Defendant's trademark infringement, unfair competition and  
15 false advertising in an amount to be proven at trial.

16 4. For an award of augmented and treble damages as alleged herein.

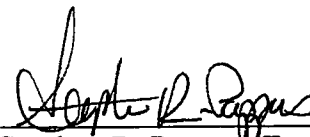
17 5. For an award of punitive and exemplary damages in an amount to be  
18 proven at trial, but sufficient to punish and deter the defendants.

19 6. For an award of attorneys' fees and litigation expenses to the maximum  
20 extent allowed by law.

21 7. For costs of suit incurred herein.

22 8. For such other and further relief as the court deems just and proper.

23 Dated: April 18, 2005.

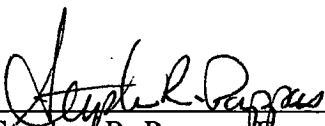
By   
Stephen R. Pappas, Esq.

Attorney for Plaintiff VOTIVO, Ltd.

**DEMAND FOR JURY TRIAL**

VOTIVO demands a trial by jury.

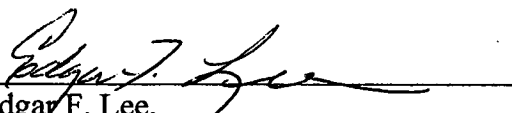
DATED: April 18, 2005.

By   
Stephen R. Pappas, Esq.

Attorney for Plaintiff VOTIVO, Ltd.

**VERIFICATION**

Edgar F. Lee declares on this 29<sup>th</sup> day of March, 2005, at Seattle, Washington, under penalty of perjury under the laws of the state of Washington that he is the President of the Plaintiff, VOTIVO, Ltd., named in this Complaint, has read the Complaint and knows its contents, and that the statements made in this Complaint are true and correct to the best of his knowledge.

  
Edgar F. Lee,

President of VOTIVO, Ltd.

**Exhibit** “**1**”

Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51 and 52

United States Patent and Trademark Office

Reg. No. 2,717,258

Registered May 20, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**TALL GRASS**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "GRASS", APART FROM THE  
MARK AS SHOWN.

FOR: SKIN SOAP AND SCENTED ROOM SPRAY,  
IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

SER. NO. 76-394,458, FILED 4-11-2002.

FIRST USE 1-29-1998, IN COMMERCE 1-29-1998.

ALICIA COLLINS, EXAMINING ATTORNEY

**Exhibit**

**" 1 "**

Exhibit "2"

Int. Cl.: 4

Prior U.S. Cls.: 1, 6 and 15

United States Patent and Trademark Office

Reg. No. 2,717,259

Registered May 20, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**TALL GRASS**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "GRASS", APART FROM THE  
MARK AS SHOWN.

FOR: CANDLES AND TAPERS, IN CLASS 4 (U.S.  
CLS. 1, 6 AND 15).

SER. NO. 76-394,459, FILED 4-11-2002.

FIRST USE 1-29-1998; IN COMMERCE 1-29-1998.

ALICIA COLLINS, EXAMINING ATTORNEY

**Exhibit**

**"2"**

Exhibit "3"

Int. Cl.: 4

Prior U.S. Cls.: 1, 6 and 15

United States Patent and Trademark Office

Reg. No. 2,720,907

Registered June 3, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**RED CURRANT**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

SEC. 2(F)

FOR: CANDLES AND TAPERS IN CLASS 4 (U.S.  
CLS. 1, 6 AND 15)

SER. NO. 76-394,463, FILED 4-11-2002.

FIRST USE 1-2-1997; IN COMMERCE 1-2-1997.

ALICIA COLLINS, EXAMINING ATTORNEY

Exhibit

“ 3 ”



Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51 and 52

Reg. No. 2,720,906

**United States Patent and Trademark Office**

Registered June 3, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**RED CURRANT**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S  
SEATTLE, WA 98134

FIRST USE 1-2-1997; IN COMMERCE 1-2-1997.

SEC. 2(F)

FOR: SKIN SOAP, SCENTED BODY SPRAY,  
SCENTED ROOM SPRAY, AND INCENSE, IN  
CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

SER. NO. 76-394,462, FILED 4-11-2002.

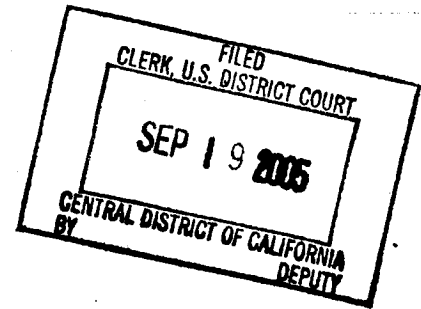
ALICIA COLLINS, EXAMINING ATTORNEY

**Exhibit "4"**

# **EXHIBIT 10**

1 Carlos Candeloro, Esq.  
2 4724 Kester Ave. #205  
3 Sherman Oaks, CA 91403  
4 California State Bar No. 194716  
5 (818) 995 6766 (tel.)  
6 carlos@candeloro.net

7 Attorney for Mine Design



8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 **Case No. CV- 05-2942-DT**

11 **Votivo Ltd., a Washington corporation,**

12 **Plaintiff/ Counter Defendant**

13 **v.**

14 **Amal Flores d.b.a. MINE DESIGN**

15 **Defendant/ Counter Claimant.**

16 **FIRST AMENDED ANSWER AND**  
17 **AFFIRMATIVE DEFENSES OF**  
18 **DEFENDANT/COUNTER**  
19 **CLAIMANT AMAL FLORES**  
20 **D.B.A. MINE DESIGN TO**  
21 **PLAINTIFF/COUNTER-**  
22 **DEFENDANT'S FIRST**  
23 **AMENDED COMPLAINT;**

24 **AND COUNTERCLAIMS OF**  
25 **DEFENDANT/COUNTER**  
26 **CLAIMANT AMAL FLORES**  
27 **D.B.A. MINE DESIGN AGAINST**  
28 **PLAINTIFF/COUNTER-**  
**DEFENDANT**

**DEMAND FOR JURY TRIAL**

**I. INTRODUCTION**

Defendant counterclaimant Amal Flores d.b.a. Mine Design (hereinafter "MINE"), for itself and no other defendant counter claims and answers the First

1 Amended Complaint for trademark infringement, unfair competition and false  
2 advertising (hereinafter, the "First Amended Complaint") filed by Votivo, Ltd.  
3 (hereinafter, "plaintiff/counter defendant") in this action and denies all allegations  
4 not specifically admitted and states as follows:

5 1.1 MINE denies the allegations in Paragraph 1.1 of the First Amended  
6 Complaint.

## 7 **II. THE PARTIES**

8 2.1 MINE is without sufficient knowledge or information to form a belief  
9 as to the truth of the allegations contained in Paragraph 2.1 of the First Amended  
10 Complaint and, on that basis, denies them.

11 2.2 Admitted that Amal Flores is an individual doing business as Mine  
12 Design.

13 2.3 MINE is without sufficient knowledge or information to form a belief  
14 as to the truth of the allegations contained in the first sentence of Paragraph 2.3 of  
15 the First Amended Complaint and, on that basis, denies them. To the extent the  
16 second sentence of Paragraph 2.3 of the First Amended Complaint contains and  
17 alleges only conclusions of law, MINE is not required to provide a response, and  
18 therefore, denies the same. MINE is without sufficient knowledge or information to  
19 form a belief as to the truth of the allegations contained in the third sentence of  
20 Paragraph 2.3 of the First Amended Complaint and, on that basis, denies them.  
21 MINE denies all remaining allegations contained in Paragraph 2.3 of the First  
22 Amended Complaint.

## 23 **III. JURISDICTION AND VENUE**

24 3.1 Because the allegations of Paragraph 3.1 of the First Amended  
25 Complaint contain only conclusions of law, MINE is not required to provide a  
26 response, and therefore, denies the same.

3.2 Because the allegations of Paragraph 3.2 of the First Amended Complaint contain only conclusions of law, MINE is not required to provide a response, and therefore, denies the same.

3.3 Because the allegations of Paragraph 3.3 of the First Amended Complaint contain only conclusions of law, MINE is not required to provide a response, and therefore, denies the same.

### 3.4 Admitted.

### III. FACTUAL BACKGROUND

4.1 MINE is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 4.1 of the First Amended Complaint and, on that basis, denies them.

4.2 MINE denies the allegations in Paragraph 4.2 of the First Amended Complaint.

4.3 MINE denies the allegations in Paragraph 4.3 of the First Amended Complaint.

4.4 MINE denies the allegations contained Paragraph 4.4 of the First Amended Complaint.

4.5 MINE is without sufficient knowledge or information to form a belief as to the truth of the allegations contained the first sentence of Paragraph 4.5 of the First Amended Complaint and, on that basis, denies them. MINE admits that the Trademark Registration Nos. 2,717,259 and 2,717,258 on their face appear to have issued to plaintiff counter-defendant for "TALL GRASS" in connection with the goods listed in paragraph 4.5 of the First Amended Complaint. MINE denies all other allegations in paragraph 4.5 of the First Amended Complaint.

4.6 MINE is without sufficient knowledge or information to form a belief as to the truth of the allegations contained Paragraph 4.6 of the First Amended Complaint and, on that basis, denies them.

1           4.7 MINE is without sufficient knowledge or information to form a belief  
2 as to the truth of the allegations contained Paragraph 4.7 of the First Amended  
3 Complaint and, on that basis, denies them.

4           4.8 MINE denies the allegations contained Paragraph 4.8 of the First  
5 Amended Complaint.

6           4.9 MINE denies the allegations contained Paragraph 4.9 of the First  
7 Amended Complaint.

8           4.10 The First Amended Complaint as served on MINE lacked an Exhibit 1.  
9 Accordingly, MINE denies the allegations contained Paragraph 4.10 of the First  
10 Amended Complaint.

11           4.11 The First Amended Complaint as served on MINE lacked an Exhibit 2.  
12 Accordingly, MINE denies the allegations contained Paragraph 4.11 of the First  
13 Amended Complaint.

14           4.12 MINE is without sufficient knowledge or information to form a belief  
15 as to the truth of the allegations contained in the first sentence of Paragraph 4.12 of  
16 the First Amended Complaint and, on that basis, denies them. To the extent the  
17 second sentence of Paragraph 4.12 of the First Amended Complaint contains and  
18 alleges conclusions of law, MINE is not required to provide a response, and  
19 therefore denies the same. MINE denies all other allegations in Paragraph 4.12 of  
20 the First Amended Complaint.

21           4.13 MINE denies having infringed or engaged in any conduct likely to  
22 cause confusion between the origin of MINE's products and plaintiff/counter  
23 defendant's products. MINE denies continuing to infringe or engage in any conduct  
24 likely to cause confusion between the origin of MINE's products and  
25 plaintiff/counter defendant's products. MINE denies the allegations regarding  
26 selling candles and other aromatic products in the home décor, gift, and/or personal  
27 care industry using the term "Tall Grass." To the extent Paragraph 4.13 of the First  
28

1 Amended Complaint contains and alleges one or more conclusions of law, MINE is  
2 not required to provide a response, and therefore, denies the same. MINE denies all  
3 other allegations in Paragraph 4.13 of the First Amended Complaint.

4           **ANSWER TO THE ALLEGATIONS IN THE FIRST CAUSE OF**  
5           **ACTION FOR FEDERAL TRADEMARK INFRINGEMENT**

6           5.1 MINE incorporates by reference each and every response contained in  
7 paragraphs 1.1 through 4.15 above, as though fully set forth herein.

8           5.2 MINE denies that plaintiff/counter defendant's trademark registrations  
9 are valid. To the extent Paragraph 5.2 of the First Amended Complaint contains  
10 and alleges one or more conclusions of law, MINE is not required to provide a  
11 response, and therefore, denies the same. MINE is without sufficient knowledge or  
12 information to form a belief as to the truth of the other allegations contained in  
13 Paragraph 5.2 of the First Amended Complaint and, on that basis, denies them.

14           5.3 MINE denies the allegations in Paragraph 5.3 of the First Amended  
15 Complaint.

16           5.4 MINE denies the allegations in Paragraph 5.4 of the First Amended  
17 Complaint.

18           5.5 MINE denies use "of the VOTIVO Trademarks" as alleged in  
19 Paragraph 5.5 of the First Amended Complaint. MINE is without sufficient  
20 knowledge or information to form a belief as to the truth of the allegations  
21 contained regarding the knowledge or consent of VOTIVO, as alleged in Paragraph  
22 5.5 of the First Amended Complaint and, on that basis, denies them. MINE denies  
23 the implicit allegation in Paragraph 5.5 of the First Amended Complaint that MINE  
24 would require VOTIVO's consent or permission to use the generic term "tall grass"  
25 as alleged.

26           5.6 MINE denies the allegations contained in Paragraph 5.6 of the First  
27 Amended Complaint.

1           5.7    MINE denies the allegations contained in Paragraph 5.7 of the First  
2 Amended Complaint.

3           5.8    MINE denies the allegations contained in Paragraph 5.8 of the First  
4 Amended Complaint.

5           5.9    MINE denies the allegations contained in Paragraph 5.9 of the First  
6 Amended Complaint.

7           5.10   MINE denies the allegations contained in Paragraph 5.10 of the First  
8 Amended Complaint.

9           5.11   MINE denies the allegations contained in Paragraph 5.11 of the First  
10 Amended Complaint.

11          5.12   MINE denies the allegations contained in Paragraph 5.12 of the First  
12 Amended Complaint.

13          5.13   MINE denies the allegations contained in Paragraph 5.13 of the First  
14 Amended Complaint.

15                   **ANSWER TO THE ALLEGATIONS IN THE SECOND CAUSE OF**  
16                   **ACTION FOR VIOLATION OF LANHAM ACT SECTION 43(A)**

17          6.1    MINE incorporates by reference each and every response contained in  
18 paragraphs 1.1 through 5.13 above, as though fully set forth herein.

19          6.2    MINE denies the allegations contained in Paragraph 6.2 of the First  
20 Amended Complaint.

21          6.3    MINE denies the allegations contained in Paragraph 6.3 of the First  
22 Amended Complaint.

23          6.4    MINE denies the allegations contained in Paragraph 6.4 of the First  
24 Amended Complaint.

25          6.5    MINE denies the allegations contained in Paragraph 6.5 of the First  
26 Amended Complaint.

1           6.6 MINE denies the allegations contained in Paragraph 6.6 of the First  
2 Amended Complaint.

3           6.7 MINE denies the allegations contained in Paragraph 6.7 of the First  
4 Amended Complaint.

5           6.8 MINE denies the allegations contained in Paragraph 6.8 of the First  
6 Amended Complaint.

7           6.9 MINE denies the allegations contained in Paragraph 6.9 of the First  
8 Amended Complaint.

9                   **ANSWER TO THE ALLEGATIONS IN THE THIRD CAUSE OF**  
10                                   **ACTION**

11           7.1 MINE incorporates by reference each and every response contained in  
12 paragraphs 1.1 through 6.9 above, as though fully set forth herein.

13           7.2 MINE denies the allegations contained in Paragraph 7.2 of the First  
14 Amended Complaint.

15           7.3 MINE denies the allegations contained in Paragraph 7.3 of the First  
16 Amended Complaint.

17           7.4 MINE denies the allegations contained in Paragraph 7.4 of the First  
18 Amended Complaint.

19           7.5 MINE denies the allegations contained in Paragraph 7.5 of the First  
20 Amended Complaint.

21           7.6 MINE denies the allegations contained in Paragraph 7.6 of the First  
22 Amended Complaint.

23                   **ANSWER TO THE ALLEGATIONS IN THE FOURTH CLAIM FOR**  
24                                   **RELIEF**

25           8.1 MINE incorporates by reference each and every response contained in  
26 paragraphs 1.1 through 7.6 above, as though fully set forth herein.

1           8.2 MINE denies the allegations contained in Paragraph 8.2 of the First  
2 Amended Complaint.

3           8.3 MINE denies the allegations contained in Paragraph 8.3 of the First  
4 Amended Complaint.

5           8.4 MINE denies the allegations contained in Paragraph 8.4 of the First  
6 Amended Complaint.

7           8.5 MINE denies the allegations contained in Paragraph 8.5 of the First  
8 Amended Complaint.

9           8.6 MINE denies the allegations contained in Paragraph 8.6 of the First  
10 Amended Complaint.

11          8.7 MINE denies the allegations contained in Paragraph 8.7 of the First  
12 Amended Complaint.

13          8.8 MINE denies the allegations contained in Paragraph 8.8 of the First  
14 Amended Complaint.

15                   **ANSWER TO THE ALLEGATIONS IN THE FIFTH CLAIM FOR**  
16                                   **RELIEF**

17          9.1 MINE incorporates by reference each and every response contained in  
18 paragraphs 1.1 through 8.8 above, as though fully set forth herein.

19          9.2 MINE denies the allegations contained in Paragraph 9.2 of the First  
20 Amended Complaint.

21          9.3 MINE denies the allegations contained in Paragraph 9.3 of the First  
22 Amended Complaint.

23          9.4 MINE denies the allegations contained in Paragraph 9.4 of the First  
24 Amended Complaint.

25          9.5 MINE denies the allegations contained in Paragraph 9.5 of the First  
26 Amended Complaint.

9.6 MINE denies the allegations contained in Paragraph 9.6 of the First Amended Complaint.

9.7 MINE denies the allegations contained in Paragraph 9.7 of the First Amended Complaint.

## AFFIRMATIVE DEFENSES

Mine asserts the following affirmative defenses to each Count and claim raised in the First Amended Complaint, unless otherwise indicated.

## FIRST AFFIRMATIVE DEFENSE

**(Failure to State a Claim)**

10.1 The First Amended Complaint, and each claim raised, fails to state a claim against MINE upon which relief may be granted.

## SECOND AFFIRMATIVE DEFENSE

**(Invalidity/Unenforceability)**

11.1 Plaintiff should not prevail because the generic descriptor "tall grass" as used by the Plaintiff does not constitute a trademark use and therefore, is not capable of trademark protection.

### THIRD AFFIRMATIVE DEFENSE

**(Non-infringement)**

12.1 MINE's alleged activities relating the "tall grass" generic descriptor would not constitute trademark use and therefore cannot constitute infringement of any alleged trademark in that generic descriptor.

#### FOURTH AFFIRMATIVE DEFENSE

**(Fair Use)**

13.1 MINE's alleged activities relating to the "tall grass" generic descriptor would constitute fair use and thus not be actionable.

1 **FIFTH AFFIRMATIVE DEFENSE**

2 **(Estoppel)**

3 14.1 The First Amended Complaint, and each and every cause of action  
4 asserted therein against MINE, is barred, in whole or in part, by the doctrine of  
5 estoppel.

6 **SIXTH AFFIRMATIVE DEFENSE**

7 **(Laches)**

8 15.1 The First Amended Complaint, and each and every cause of action  
9 asserted therein against MINE, is barred, in whole or in part, by the doctrine of  
10 laches.

11 **SEVENTH AFFIRMATIVE DEFENSE**

12 **(Full disclosure)**

13 16.1 Plaintiff should not prevail because MINE provides full and adequate  
14 disclosure to customers.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 **(Unclean Hands)**

17 17.1 The First Amended Complaint, and each and every cause of action  
18 asserted therein against MINE, is barred, in whole or in part, by the doctrine of  
19 unclean hands.

20 **NINTH AFFIRMATIVE DEFENSE**

21 **(Mistake or Inadvertence)**

22 18.1 Plaintiff should not prevail against MINE because the conduct  
23 complained of occurred, if at all, as a result of mistake or inadvertence.

24 **TENTH AFFIRMATIVE DEFENSE**

25 **(Invalidity/Unenforceability/Abandonment)**

26 19.1 Plaintiff should not prevail because the descriptor "tall grass" is  
27 generic and/or descriptive and therefore is not capable of trademark protection.  
28

1 19.2 Plaintiff should not prevail because Plaintiff has ceased using the term  
2 "tall grass" and does not intend to resume use of the term.  
3

#### 4 MINE'S COUNTERCLAIMS

5 20.1 Without waiving the foregoing Defenses, MINE asserts the following  
6 Counterclaims seeking a declaration of MINE's noninfringement of the Plaintiff's  
7 alleged trademarks, the invalidity and/or unenforceability of those alleged  
8 trademarks and the cancellation of Plaintiff's trademark registrations.

9 20.2 These counterclaims are an action for declaratory judgment pursuant to  
10 Title 28, United States Code, § 2201, for the purpose of determining a question of  
11 actual controversy between the parties, as more fully appears below.

12 20.3 Jurisdiction of this action is based on Title 28, United States Code, §  
13 1331 and, *inter alia*, Title 15, United States Code, § 1119.

14 20.4 Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

15 20.5 MINE has an interest in the use of the term "tall grass" as a common  
16 descriptive term of the scent of tall grass in scented aromatic candles and other  
17 articles produced by MINE that carry the aromatic scent of tall grass.

18 20.6 Plaintiff has allegedly registered the term "Tall Grass" as a trademark  
19 in connection with aromatic candles, tapers and other goods.

20 20.7 "Tall grass" is a noun defined in the online dictionary at  
21 <http://www.thefreedictionary.com/tallgrass> as "any of various grasses that are tall  
22 and that flourish with abundant moisture."

23 20.8 VOTIVO does not hold a patent for the formulation of the scent that is  
24 the ingredient in its tall grass scented candle.

25 20.9 VOTIVO does not hold a patent for a tall grass scented candle.

26 20.10 VOTIVO's line of aromatic candles is sold in a box.  
27  
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1           20.11 VOTIVO obtained a trademark, Reg. No. 2,554,977 (hereinafter the  
2 '977 mark), for elements of the box in which it sells its candles.

3           20.12 Among the elements of the '977 mark, "the box contains an aromatic  
4 candle and a colored label on the front of the box identifying the aromatic scent [of  
5 the candle] along with the 'VOTIVO' name."

6           20.13 VOTIVO has alleged in litigation against third parties that the design  
7 and appearance of VOTIVO's '977 mark has come to be associated with VOTIVO  
8 and serves to distinguish VOTIVO's products from the goods of other companies,  
9 and that, accordingly, consumers have come to understand that the origin of  
10 VOTIVO's aromatic scented candles is indicated by VOTIVO's '977 mark.

11           20.14 VOTIVO has alleged that one of the candles in VOTIVO's line of  
12 aromatic candles was labeled "Tall Grass."

13           20.15 The term "Tall Grass" on the label of the box of VOTIVO's candle  
14 identified the aromatic scent of the aromatic candle in the box. In particular, the  
15 "Tall Grass" term as used by VOTIVO described that the candles had the aromatic  
16 scent of tall grass.

17           20.16 The VOTIVO name (hereinafter "the VOTIVO house mark") figured  
18 prominently on the label of the box in which VOTIVO's tall grass scented candles  
19 were sold.

20           20.17 Consumers understand that "Tall Grass" on the label of an aromatic  
21 scented candle bearing a house mark serves as an identifier of the scent of the  
22 candle.

23           20.18 Consumers do not understand "Tall Grass" on the label of an aromatic  
24 scented candle bearing a house mark as indicating the origin of the candle.

25           20.19 Plaintiff/counter defendant's trademark registrations and alleged  
26 trademarks are invalid and would not be infringed by MINE's use of the term to  
27 label tall grass scented candles and other articles. The term "tall grass" when  
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1 applied to the articles of trade at issue is merely descriptive of the ingredients,  
2 qualities or characteristics of the articles, thus it cannot be appropriated as a  
3 trademark and the exclusive use of it afforded legal protection.

4 WHEREFORE, Defendant counter claimant MINE prays for judgment  
5 against plaintiff/counter defendant as follows:

6 a. That plaintiff/counter defendant take nothing by reason of its First  
7 Amended Complaint or otherwise;

8 b. A dismissal of the First Amended Complaint with prejudice;

9 c. That the Court enter a declaratory judgment that United States  
10 Trademark Registration Nos. 2,717,258 and 2,717,259 are invalid and an Order  
11 directing the Director of the Patent and Trademark Office to cancel said  
12 registrations;

13 d. That the Court enter a declaratory judgment that MINE's use of the  
14 term "tall grass" as a descriptor of the scent of tall grass scented articles is lawful;

15 e. MINE be awarded its reasonable attorney's fees, costs and other  
16 expenses incurred in this action; and

17 f. For such other and further relief as the Court deems proper.

18  
19 **DATED:** September 19, 2005

20  
21 By: 

22 Carlos Candeloro  
23 Attorney for Defendant  
24 MINE  
25  
26  
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28

1 DEMAND FOR JURY TRIAL

2 MINE demands a trial by jury.

3  
4  
5 DATED: September 19, 2005

6  
7 By: 

8 Carlos Candeloro  
9 Attorney for Defendant  
10 MINE  
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1 PROOF OF SERVICE – U.S. MAIL

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am and was at all times herein mentioned employed in the County of Los  
4 Angeles, State of California. I am over the age of 18 years and not a party to the  
5 within action or proceeding. My address is 4724 Kester Ave. #205, Sherman Oaks,  
6 CA 91403.

7 On September 19, 2005, I served a true copy of:  
8 **FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES OF**  
9 **DEFENDANT/COUNTER CLAIMANT AMAL FLORES D.B.A. MINE**  
10 **DESIGN TO PLAINTIFF/COUNTER-DEFENDANT'S FIRST AMENDED**  
11 **COMPLAINT;**  
12 **AND COUNTERCLAIMS OF DEFENDANT/COUNTER CLAIMANT**  
13 **AMAL FLORES D.B.A. MINE DESIGN AGAINST**  
14 **PLAINTIFF/COUNTER-DEFENDANT**

15 on the interested parties in this action by placing said document enclosed in a  
16 sealed envelope addressed as follows:

17 Stephen R. Pappas  
18 550 South California Ave., Suite 320  
19 Palo Alto, California 94306

20 I caused such envelope with postage thereon fully prepaid to be placed in the  
21 U.S. Mail at Los Angeles, California. I am aware that on motion of the party  
22 served, service is presumed invalid if postal cancellation date or postage meter date  
23 is more than one day after date of deposit for mailing an affidavit.

24 I declare that I am employed in the office of a member of the bar of this Court  
25 at whose direction the service was made. I declare under penalty of perjury under  
26 the laws of the United States of America that the forgoing is true and correct; and  
27 that this Proof of Service was executed on September 19, 2005, at Los Angeles,  
28 California.

  
\_\_\_\_\_  
Carlos Candeloro

# **EXHIBIT 11**

**SETTLEMENT AGREEMENT**

This Settlement Agreement (the "Agreement") is made by and between VOTIVO, Ltd., a Washington corporation ("VOTIVO") on the one hand, and Amal Flores d.b.a. Mine Design, a sole proprietorship ("MINE") on the other hand, and shall be deemed entered into on the "EFFECTIVE DATE," defined as the date upon which this Agreement is fully signed by, between and among VOTIVO and MINE ("the Parties").

**RECITALS**

WHEREAS, VOTIVO is also the owner of the following trademarks each of which are registered with the United States Patent and Trademark Office: Reg. Nos. 2,720,906 and 2,720,907 for RED CURRANT, Reg. Nos. 2,717,257 and 2,717,256 for SOKU LIME, and Reg. Nos. 2,717,259 and 2,717,258 for TALL GRASS (collectively, the "VOTIVO Registrations");

WHEREAS, the following two litigations pending between the Parties in federal court: (i) U.S. Court of Appeals (9th Cir.), Docket No. 06-55147; and (ii) District Court (C.D. Cal.), Case No. CV 05-2942 (the "Lawsuits");

WHEREAS, a Default Judgment and Permanent Injunction were entered in favor of VOTIVO and against MINE in the District Court (C.D. Cal.), Case No. CV 03-6017 (Exhibit A hereto) (the "Permanent Injunction");

WHEREAS, MINE has paid VOTIVO in full for the judgment entered in Case No. CV 03-6017, while reserving his rights on appeal, to collaterally attack the judgment and any other rights MINE may have against VOTIVO regarding said judgment (Exhibit B hereto);

WHEREAS, MINE has appealed the judgment in Case No. CV 03-6017 (U.S. Court of Appeals (9th Cir.) Docket No. 06-55147);

WHEREAS, Case No. CV 05-2942 is still in the discovery phase;

WHEREAS, both Parties desire to fully, completely and finally settle and compromise, in accordance with the terms set forth below, without the further cost, expense or continued litigation, the Lawsuit and the dispute between them;

NOW, THEREFORE, in mutual consideration for the promises, payments and other consideration in the Agreement it is hereby stipulated and agreed by the undersigned parties as follows:

#### AGREEMENT

1. Dismissal of Pending Suits. Upon execution of this Agreement by both Parties and payment as set forth in Section 2 below, MINE and VOTIVO, each agree, respectively to dismiss their claims against the other in the Lawsuits, without attorneys' fees or costs, by executing and filing the Stipulation of Dismissal in the form attached hereto as Exhibit C.

2. Payments. VOTIVO acknowledges receipt from MINE of \$20,166.00 remitted March 23, 2006, and accepts such payment in full satisfaction of the judgment entered Nov. 7, 2005 in Case No. CV 03-6017 and any other and all fees and costs associated therewith. MINE agrees to pay VOTIVO an additional \$3,000.00 within 15 days of the EFFECTIVE DATE.

3. Use of VOTIVO Registrations. MINE agrees that he will not, directly or indirectly, alone or in association with others, either as a principal agent, director, indirect owner, shareholder, partner, joint venturer or member, officer, director, employee, investor, consultant, manager or in any other capacity use (i) the VOTIVO Registrations or any confusingly similar words, terms, trademarks or trade names in connection with any of his products or services, or (ii) any of the trademarks set forth in the Permanent Injunction provided such trademarks remain registered with the United States Patent and Trademark Office. Finally, prior to introducing any

new product names, MINE agrees to perform a search of the records of the United States Patent and Trademark Office for any other registered or pending VOTIVO trademarks.

4. No Challenge to VOTIVO Registrations. MINE will not, directly or indirectly, alone or in association with others, initiate any proceeding challenging the protectability or validity of the VOTIVO Registrations.

5. Representations and Warranties.

a. VOTIVO represents and warrants that it fully and exclusively owns every cause of action, claim, demand, right or other matter that VOTIVO asserted in the Lawsuits; and that no other person or entity has or claims any interest in any such trademark, cause of action, claim, demand or right. VOTIVO further represents that it is under no obligation or legal disability that would prevent it from releasing said actions, claims, demands and rights, or from entering into this Agreement.

b. MINE represents and warrants that he fully and exclusively owns every cause of action, claim, demand, right or other matter that MINE asserted in the Lawsuits; and that no other person or entity has or claims any interest in any such trademark, cause of action, claim, demand or right. MINE further represents that he is under no obligation or legal disability that would prevent him from releasing said actions, claims, demands and rights, or from entering into this Agreement. MINE further represents that to his knowledge, except as set forth in the Lawsuits, he has not used or infringed any of the trademarks set forth in Permanent Injunction up until the EFFECTIVE DATE. For purposes of this Agreement, "knowledge" means such knowledge after due inquiry and reasonable investigation.

6. Mutual Releases. In exchange for good and valuable consideration, including the promises and commitments set forth in this Agreement, both Parties mutually agree to waive and

release any and all claims and/or liabilities the Parties may have against each other and their respective owners, officers, employees, directors, shareholders, agents, representatives, parent corporations, affiliates and subsidiaries, and the successors and assigns of any of them, including any and all demands, claims, rights, obligations, liabilities, causes of action, duties, debts, sums of money, promises, and accounts, of whatever kind, nature or description, direct or indirect, in law or in equity, in contract or tort or otherwise up until the EFFECTIVE DATE.

7. Release of Unknown Claims. The Parties understand that this agreement includes the release of certain types of unknown claims. The Parties acknowledge that they have had the opportunity to obtain advice of legal counsel and are familiar with California Civil Code Section 1542, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Having been fully informed of the provisions of California Civil Code Section 1542, the Parties nevertheless hereby waive and release any rights that the Parties may otherwise have to dispute the scope of this agreement on the ground of said code section.

8. Notice of Trademark Rights.

a. After the EFFECTIVE DATE, in each instance VOTIVO or any of its successors in interest in good faith believes MINE or any of its successors in interest is using a term in connection with the sale of goods for which VOTIVO has a valid and subsisting federal trademark registration ("the OFFENDING TERM"), VOTIVO shall inform MINE in writing as set forth in Section 23 below of such claim ("WRITTEN NOTICE"). MINE shall have 30 days from the NOTICE DATE ("the GRACE PERIOD") to respond to said WRITTEN NOTICE. Provided MINE complied with its obligations as set forth in Section 3 above, VOTIVO shall not

bring suit, and shall recover no damages, attorneys' fees or any other costs for activity that occurred up until the date by which MINE's response was due if MINE during said GRACE PERIOD (a) changes the OFFENDING TERM on its products, catalogs, etc., with an acceptable substitute term ("SUBSTITUTE TERM") or (b) provides VOTIVO with reasonable assurances that MINE has otherwise discontinued its use of the OFFENDING TERM.

b. VOTIVO shall have the right to bring a trademark infringement suit against MINE only if, after 30 days have elapsed from the NOTICE DATE,:

- (i) the Parties cannot reasonably agree on a SUBSTITUTE TERM;
- (ii) MINE has not provided VOTIVO with reasonable assurance that MINE has otherwise discontinued its use of the OFFENDING TERM; or
- (iii) MINE does not respond to the WRITTEN NOTICE within the GRACE PERIOD.

9. Entire Agreement. This Agreement constitutes the entire understanding and agreement between the parties respecting the settlement of all demands, claims, rights, obligations, liabilities, causes of action, duties, debts, sums of money, promises, or accounts between the Parties up until the EFFECTIVE DATE, and supersedes all other agreements, express or implied, between the Parties respecting its subject matter. This Agreement may not be changed or modified, except by a writing signed by the parties hereto.

10. Covenant Not To Sue. Each Party hereto and their respective representatives covenants and agrees that they will forever refrain and forebear from bringing, commencing or prosecuting any action, lawsuit, claim, or proceeding against the other Party hereto based on any claim, debt or obligation of any kind that is released or discharged herein.

11. Consent to Jurisdiction. This Agreement will be governed by and construed under the laws of the State of California. The Central District of California will retain jurisdiction for the purpose of enforcing this Agreement.

12. Consultation with Counsel. The Parties acknowledge that each of them has consulted with, or had the opportunity to consult with, legal counsel of their own selection about this Agreement and the releases contained herein, including California Civil Code Section 1542. The Parties each understand that this Agreement will affect their legal rights, and voluntarily enter into this Agreement with such knowledge and understanding. Each of the Parties warrants and represents that the person signing the Agreement on behalf of that party has full authority to do so.

13. Severability. The Parties agree that if any part, term, or provision of this Agreement shall be found illegal or in conflict with any valid controlling law, the validity of the remaining provisions shall not be affected thereby.

14. Headings, Exhibits and Pronouns. Section headings and pronouns contained in this Agreement are for convenience only and shall not be considered for any purpose in construing the Agreement. The exhibits hereto shall be construed with and as an integral part of this Agreement to the same effect as if the contents thereof had been set forth verbatim herein.

15. Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assigns.

16. No Waiver. Any waiver by a Party of any term of this Agreement shall not be deemed a waiver of any other term. No term of this Agreement may be waived except by a written waiver signed by the waiving Party.

17. Integration. This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and fully supersedes any and all prior understandings, representations, warranties and agreements between the Parties pertaining to the subject matter hereof. This Agreement may not be explained or supplemented by evidence of consistent additional terms or contradicted by evidence of any prior or contemporaneous agreement. The recitals set forth above are incorporated in this Agreement as if fully set forth herein.

18. Mutual Drafting. The Parties agree that this Agreement has been drafted by and is the product of both Parties and that it is the intention of the Parties that this Agreement shall not be construed against either Party based on the assumption or premise that one Party or the other was the drafter of the Agreement.

19. Modification. The Parties agree that any amendments or modifications to this Agreement shall be deemed null and void unless such amendments and modifications are in writing, specifically refer to this Agreement, and are signed by authorized representatives of all Parties.

20. Costs. Each Party will bear its own costs, expenses and attorneys' fees.

21. Authority to Sign. Each signatory to the Agreement represents and warrants that s/he has the necessary authority to bind such Party to the terms contained herein.

22. Counterparts. This Agreement may be executed in counterparts and by facsimile, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

23. Notice. Any written notice required or permitted to be given under this Agreement shall be sufficient if sent by facsimile or overnight mail to the other party at the addresses shown below, and shall be deemed given as of the day after the date so sent. Although

notice is to be given in writing, the parties agree to make a good-faith effort to telephone applicable counsel when notice is being given.

For VOTIVO: VOTIVO, LTD.  
3450 4<sup>th</sup> Avenue S.  
Seattle, WA 98134  
Attn.: Mr. Edgar F. Lee

With a copy to: INVICTA LAW GROUP, PLLC  
1000 Second Avenue, Suite 3310  
Seattle, Washington 98104-1019  
Attn.: Mr. Mark V. Jordan

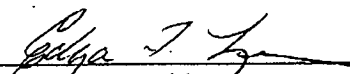
For MINE: MINE Design  
11151 Mississippi Ave.  
Los Angeles, CA 90025  
Attn.: Amal Flores

With a copy to: Carlos Candeloro  
1601 N. Sepulveda Blvd. 239  
Manhattan Beach, CA 90266  
or  
[carlos@candeloro.net](mailto:carlos@candeloro.net)

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date written below and on behalf of the parties listed with their respective signatures.

**VOTIVO, LTD.**

Date: May 1, 2006

By:   
Edgar F. Lee, President

Date: 5/5/06

  
Amal Flores d.b.a. Mine Design

# **EXHIBIT 12**

Carlos Candeloro  
4724 Kester Ave. #205  
Sherman Oaks, CA 91403  
Tel: (818) 995-6766

Attorney for Defendant/Appellant  
Mine Design

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

Votivo Ltd.,

Plaintiff/Appellee,

v.

Mine Design,

Defendant/Appellant.

**No. 06-55147**

**D.C. No. CV- 03-6017-DT  
(C.D. Cal. Los Angeles)**

**DISMISSAL AGREEMENT  
PURSUANT TO F.R.A.P. 42(b)**

IT IS HEREBY STIPULATED and agreed by and between the parties to this appeal through their designated counsel that the above-captioned appeal be and hereby is dismissed pursuant to Fed. R. App. P. 42(b), each party to pay its own costs. While it is believed no court fees are due, to the extent any court fees remain, these shall be charged to Appellant Mine Design.

Dated: 5/30, 2006.

INVICTA LAW GROUP PLLC

By

  
Mark Jordan

Attorneys for Plaintiff/Appellee

Dated: May 30, 2006.

TALMADGE LAW GROUP PLLC

By Philip A. Talmadge  
Philip A. Talmadge  
Attorneys for Plaintiff/Appellee

Dated: , 2006.

By \_\_\_\_\_  
Carlos Candeloro  
Attorney for Defendant/Appellant

## DECLARATION OF SERVICE

On said day below I deposited in the U.S. Postal Service a true and correct copy of the following documents: Dismissal Agreement Pursuant To F.R.A.P. 42(b), United States Court of Appeals for the Ninth Circuit No. 06-55147, to the following:

Mark Jordan, Esq.  
Invicta Law Group PLLC  
1000 Second Avenue, Suite 3310  
Seattle, WA 98104-1019

Philip A. Talmadge, Esq.  
Talmadge Law Group PLLC  
18010 Southcenter Parkway  
Tukwila, WA 98188

Peter W. Sherwood, Circuit Mediator  
Circuit Mediation Office  
U.S. Court of Appeals  
P.O. Box 193939  
San Francisco, CA 94119-3939

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

DATED: \_\_\_\_\_, 2006, at Los Angeles, California

---

Carlos Candeloro  
Attorney at Law

# **EXHIBIT 13**

1 Stephen R. Pappas, Esq.  
2 550 South California Avenue, Suite 320  
3 Palo Alto, California 94306-1441  
4 650/858-8400 - Telephone  
5 650/858-8508 - Facsimile  
6 California State Bar No. 158560

7 Attorney for Plaintiff  
8 Votivo, Ltd.

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA

11 VOTIVO, LTD., a Washington  
12 corporation,

13 Plaintiff,

14 vs.

15 AMAL FLORES D.B.A. MINE  
16 DESIGN, a sole proprietorship  
17 and DOES 1 through 20,

18 Defendants.

Case No. CV05 2942 DT (EX)

STIPULATION FOR DISMISSAL  
WITH PREJUDICE AND WITHOUT  
COSTS

19 COME NOW the parties hereto, by and through their respective  
20 counsel of record herein, and hereby stipulate that the above-  
21 entitled action, including all claims and counterclaims, may and  
22 shall be dismissed with prejudice, and that judgment of dismissal  
23 may be entered accordingly, without costs to either party. It is  
24 further stipulated by and between the parties, that an Order  
25 pursuant to the foregoing may be entered of record by judge,  
26 magistrate or clerk, without notice to either party, upon

27 ///

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///

///

1 presentation of this Stipulation,

2  
3 Dated: 5/30/06

4 By: 

5 Stephen R. Pappas, Esq.  
6 Attorney For Plaintiff  
7 Votivo, Ltd.

8 Dated: May 22 2006

9 By: 

10 Carlos Candeloro, Esq.  
11 Attorney For Defendant  
12 Amal Flores d/b/a Mine  
13 Design  
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PROOF OF SERVICE

I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 550 South California Avenue, Suite 320, Palo Alto, California 94306-1441. On May 30, 2006, I served the foregoing documents described as

**STIPULATION FOR DISMISSAL WITH PREJUDICE AND WITHOUT COSTS**

on the following interested party(s) in said cause:

Carlos Candeloro, Esq.  
4724 Kester Avenue, #205  
Sherman Oaks, California 91403

**[X] VIA MAIL -- CCP §§1013(a), 2015.5:**

By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at Palo Alto, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

**[ ] VIA OVERNIGHT MAIL/COURIER -- CCP §§1013(c), 2015.5:**

By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would, in the ordinary course of business, be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 30, 2006, at Palo Alto, California.

  
\_\_\_\_\_  
Stephen R. Pappas

# **EXHIBIT 14**

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## INTELLECTUAL PROPERTY, INVENTORY, AND OTHER PHYSICAL PROPERTY ASSET PURCHASE AND TRANSFER AGREEMENT

THIS INTELLECTUAL PROPERTY, INVENTORY, AND OTHER PHYSICAL PROPERTY ASSET PURCHASE AND TRANSFER AGREEMENT (the "Agreement") is made on the latter date of execution below by either Party,

**BETWEEN:**

**BUYER, VOTIVO, LLC**, a limited liability company organized under the laws of the State of South Carolina, having a main business office at 951 South Pine Street, Suite 135, Spartanburg, South Carolina 29302 (hereinafter also the "Buyer"); and

**SELLER, VOTIVO, LTD.**, a corporation organized under the laws of the State of WASHINGTON, having a main business office at 3450 Fourth Avenue South, Seattle, Washington 98134 (hereinafter also "Seller's").

**WHEREAS:**

- A. Seller has agreed to sell and transfer to Buyer certain of the Assets consisting of all of Seller's right, title and interest in such Assets as constitute Intellectual Property Assets (as defined below), All Accounts Receivable (as defined below), All Accounts Payable (as defined below), All Contractual Rights (as defined below), All Inventory (as detailed in Schedule F) (the "Inventory") and other Physical Property/Fixed Assets (as detailed in Schedule G) (the "Physical Property/Fixed Assets").
- B. Buyer has agreed to purchase and acquire the Intellectual Property Assets (as defined below), All Accounts Receivable (as defined below), All Accounts Payable (as defined below), All Contractual Rights (as defined below), All Inventory (as detailed in Schedule F) (the "Inventory") and other Physical Property/Fixed Assets (as detailed in Schedule G) (the "Physical Property/Fixed Assets") for the Consideration (as defined below).

**NOW, THEREFORE**, in consideration of the mutual promises hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the **PARTIES HEREBY AGREE AS FOLLOWS:**

**1. IN THIS AGREEMENT---Definitions and Interpretations:**

**1.1 Business** means the commercial operations of Seller pertaining to development, sales, marketing, support manufacturing and distribution of candles, home fragrance products, and personal care/bath products (hand and body soaps, lotions, body mists, and bath salts), as conducted by or on behalf of Seller prior to, and as of the Transfer Time.

If to the Buyer, to:

BUYER: VOTIVO, LLC  
Address: 951 South Pine Street, Suite 135, Spartanburg, SC 29302  
Attention: Mr. Bob Caldwell, Sr.

or to such other address as a Party may specify by notice from time to time in writing to the other Parties in the manner specified in this Section.

#### 6. WAIVER OF BULK SALES REQUIREMENTS

Seller and Buyer each waives compliance with any applicable bulk sales laws, including, without limitation, the Uniform Commercial Code Bulk Transfer provisions.

#### 7. LEGAL REPRESENTATION

Seller has been represented by the law firm of Invicta Law Group, PLLC in connection with the preparation and negotiation of this Agreement and the documents related hereto and in connection with the consummation of the transactions contemplated hereby. Buyer has been represented by the law firm of Dority & Manning, Attorneys At Law, P.A in connection with the preparation and negotiation of this Agreement and the documents related hereto and in connection with the consummation of the transactions contemplated hereby.

*AS WITNESS*, this Agreement has been signed respectively by or on behalf of the Parties the day and year as written below with the respective, authorized signatures.

SELLER: VOTIVO, LTD

By: 

Name: EDGAR F. LEE

Title: PRESIDENT

Date: 9-28-2007

BUYER: VOTIVO, LLC

By: 

Name: ROBERT E. CALDWELL, JR.

Title: EXECUTIVE VICE PRESIDENT

Date: 9/28/2007

## SCHEDULE A: Intellectual Property Assets

*[Handwritten signature]*

### SCHEDULE A INTELLECTUAL PROPERTY ASSETS

A. All Intellectual Property Assets of Seller, including, but not limited to the following specific intellectual property assets: all Registered and Common Law Trademarks, Copyrights and Patents; all customer lists, files, and records; all sales records and files; all accounting records and files; all vendor records and files; all cost related records and files; all Inventory records and files; all recipe and formulation records and files; all telephone and fax numbers; all web domain names; and all email accounts; and all other Intellectual Property Assets as defined in Section 1.5 of this Agreement, and including the following listing of US federal registration and US federal registration application matters, with items listed as "Dead" hereunder understood to be subject to claims of common law rights of Seller:

#### 1.1 USPTO Registrations/Applications

<u>Serial No.</u>	<u>Reg. No.</u>	<u>Trademark Name</u>
76/665239	3259802	Amber Essence
76/394521	2749671	Anjou Pear
76/616216	3026000	Anjou Pear
76/636187	3172622	Apricot Peach Coriander
76/636186	3175626	Apricot Peach Coriander
76/603842	3061686	Aromatic Burning Sticks
76/626961	3061895	Aromatic Candle Box with Color Claim
76/612572	3077879	Aromatic Collection
76/603835	3273165	Aromatic Collection
76/603836	3273165	Aromatic Collection
76/041198	2554977	Aromatic Collection: aromatic candle box
76/504696	3038885	Aromatic Collection: body/room mist box
76/041197	2554976	Aromatic Collection: burning sticks box
76/504432	2890863	Aromatic Collection: floating candle box
76/041199	2584438	Aromatic Collection: aromatic candle
76/504433	2890864	Aromatic Collection: pillar (short)
76/092816	2699254	Aromatic Collection: moisturizing soap box
76/504449	2892674	Aromatic Collection: pillar (tall)
76/603841	3102670	Aromatic Room Mist

76/665238 Lemon Desert Flower

76/364394 2696855 Mahogany

76/636178 3195469 Malabar Oak

76/636179 3195470 Malabar Oak

76/612570 3080277 Mandarin Grove

76/978166 3139688 Mandarin Grove

76/394471 2720908 Mandarine

76/394470 2728815 Mandarine

76/613881 Mandarine

76/394784 2713167 Minted Pomegranate

76/394785 2758232 Minted Pomegranate

76/613882 3121284 Minted Pomegranate

76/394466 2717264 Moroccan Fig

76/394467 2717265 Moroccan Fig

76/607961 3033700 Moroccan Fig

76/613883 3127427 Moroccan Fig

76/394518 2720910 Mt. Airy Azalea

76/616207 3025993 Mt. Airy Azalea

76/571740 2985971 Murano

76/564880 2985942 Murano Collection

76/603834 3214472 Murano Collection: candle box

76/394493 2749668 Nantucket Christmas

76/394499 3024971 Newbury Holly

76/616221 3026003 Newbury Holly

76/394460 2717260 Night

76/394461 2717261 Night

76/629604 3171937 NOLA

76/629605 3171938 NOLA

76/394487 2731597 Paperwhite Narcissus

76/665175 Pink Tangerine

76/636188 3214167 Pomegranate Teak

76/636189 3214168 Pomegranate Teak

76/394486 3072388 Prairie Sage

76/394485 2990877 Provencal Honey

76/616217 3026001 Provencal Honey

76/636196 3108523 Red Courage Poppy

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## ASSIGNMENT OF TRADEMARK INTERESTS

WHEREAS, ASSIGNOR (VOTIVO, LTD., a corporation organized under the laws of the State of WASHINGTON, having a main business office at 3450 Fourth Avenue South, Seattle, Washington 98134), is the sole and exclusive owner of the common law trademarks United States Registrations and foreign registrations as included within Exhibit A attached hereto, and/or is the named Applicant of pending applications for federal registration (based on claimed use) as included within Exhibit A attached hereto;

WHEREAS, ASSIGNEE (VOTIVO, LLC, a limited liability company organized under the laws of the State of South Carolina, having a main business office at 951 South Pine Street, Suite 135, Spartanburg, South Carolina, 29302), is desirous of acquiring the aforesaid trademarks, registrations thereof and/or above-referenced pending use-based registration applications;

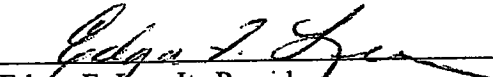
NOW, THEREFORE, be it known that for and in consideration of the sum of one dollar (\$ 1.00) and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, ASSIGNOR hereby sells, transfers, and assigns to ASSIGNEE all rights, titles, and interests in and to the said trademarks, registrations thereof, and/or pending registration applications, together with the goodwill of the business symbolized thereby, and the Commissioner of Patents and Trademarks is requested to issue to ASSIGNEE as the owner of the full and exclusive title thereto all certificates of registration of the aforesaid marks based on the above-referenced applications.

FURTHER, ASSIGNOR assigns unto ASSIGNEE all right to sue for and to receive all damages occurring from past infringement of the trademarks and/or registrations referenced above.

ASSIGNOR further warrants that upon the request of ASSIGNEE it shall make all rightful oaths, testify on the behalf of ASSIGNEE in matters involving the trademarks, registrations and/or applications, referenced above, and do all other lawful acts reasonably necessary to carry out the intent of this Assignment, as well as to provide such other material, information, and/or assistance to ASSIGNEE as will be considered reasonably necessary in connection therewith.

IN WITNESS WHEREOF, Assignor hereby executes this Assignment by its duly authorized President at Seattle, Washington as of this 28<sup>th</sup> day of September 2007.

VOTIVO, LTD.

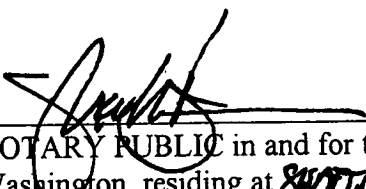
By   
Edgar F. Lee, Its President

STATE OF WASHINGTON     )  
                                      )  
COUNTY OF KING         )     ss.

On September 29, 2007, I certify that I know or have satisfactory evidence that Edgar F. Lee is the person who appeared before me, and he acknowledged that he signed the foregoing instrument as President and on behalf of VOTIVO, Ltd., a Washington corporation, as his free and voluntary act and deed for the uses and purposes therein mentioned, being authorized to do so.

WITNESS my hand and official seal the date and year in this certificate written above.



  
NOTARY PUBLIC in and for the State of  
Washington, residing at 8417 15<sup>th</sup>  
My Commission expires: 4/29/2010

**EXHIBIT A**  
**FOR**  
**ASSIGNMENT OF TRADEMARK INTERESTS**

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76/603840	3000225	Garden Incense
76/394520	2749670	Gingered Currant
76/616214	3025999	Gingered Currant
76/636223	3178969	Gingered Tangerine
76/636224	3178970	Gingered Tangerine
76/611644	3061794	Gingersnap Set of 4 Aromatic Soaps Box
76/611649	3052563	Gingersnap 3 Wick Aromatic Candle Box
76/610550	3025827	Gingersnap Aromatic Candle Box
76/611648	3052562	Gingersnap Aromatic Room Mist Box
76/394519	2749669	Golden Fuji Apple
76/610169	3088144	Greenfield Melon
76/978196	3139692	Greenfield Melon
76/636182	3152599	Greenmountain Papaya
76/636183	3155735	Greenmountain Papaya
76/476559	2816468	Joie De Noel
76/476560	2816469	Joie De Noel
76/611645	3052560	Joie De Noel Set of 4 Aromatic Soaps Box
76/611647	3061795	Joie De Noel 3 Wick Aromatic Candle Box
76/611646	3052561	Joie De Noel Aromatic Room Mist Box
76/097649	2661470	Joie De Noel: aromatic candle box
76/636192	3172880	Lavender Chamomile
76/636193	3172881	Lavender Chamomile
76/394492	2749667	Lavender Fields
76/665238		Lemon Desertflower
76/364394	2696855	Mahogany
76/636178	3195469	Malabar Oak
76/636179	3195470	Malabar Oak
76/612570	3080277	Mandarin Grove
76/978166	3139688	Mandarin Grove
76/394471	2720908	Mandarine
76/394470	2728815	Mandarine
76/394784	2713167	Minted Pomegranate
76/394785	2758232	Minted Pomegranate
76/613882	3121284	Minted Pomegranate
76/394466	2717264	Moroccan Fig
76/394467	2717265	Moroccan Fig
76/607961	3033700	Moroccan Fig

## ASSIGNMENT OF INTENT-BASED TRADEMARK INTERESTS

WHEREAS, ASSIGNOR (VOTIVO, LTD., a corporation organized under the laws of the State of WASHINGTON, having a main business office at 3450 Fourth Avenue South, Seattle, Washington 98134), is the sole and exclusive Applicant for registration of the trademark per a pending intent to use based application for federal registration per Exhibit B attached hereto;

WHEREAS, ASSIGNOR has intended to use in commerce the mark listed on the attached Exhibit B, and as indicating such intention, has filed an application for registration as per such Exhibit B, but has not yet filed any Allegation of Use pertaining to such pending application per Exhibit B;

WHEREAS, ASSIGNOR is assigning the mark and registration application set forth on Exhibit B as part of the entire business or portion thereof to which the mark referenced on Exhibit B pertains, as required by 15 U.S.C. Section 1060;

WHEREAS, ASSIGNEE (VOTIVO, LLC, a limited liability company organized under the laws of the State of South Carolina, having a main business office at 951 South Pine Street, Suite 135, Spartanburg, South Carolina, 29302), is desirous of acquiring the aforesaid trademark and/or above-referenced pending intent to use-based registration application, and the entire business or portion thereof to which the mark referenced on Exhibit B pertains, as required by 15 U.S.C. Section 1060;

NOW, THEREFORE, be it known that for and in consideration of the sum of one dollar (\$ 1.00) and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, ASSIGNOR hereby sells, transfers, and assigns to ASSIGNEE all right, title, and interest in and to the said trademark and/or pending registration application referenced on Exhibit B, together with the goodwill of the business symbolized thereby, all in conjunction with ASSIGNEE acquiring the entire business or portion thereof to which the mark referenced on Exhibit B pertains, as required by 15 U.S.C. Section 1060, and the Commissioner of Patents and Trademarks is requested to issue to ASSIGNEE as the owner of the full and exclusive title thereto the certificate of registration of the aforesaid mark based on the above-referenced application.

FURTHER, ASSIGNOR assigns unto ASSIGNEE all right to sue for and to receive all damages occurring from past infringement of the trademark and/or registration matters referenced above.

ASSIGNOR further warrants that upon the request of ASSIGNEE it shall make all rightful oaths, testify on the behalf of ASSIGNEE in matters involving the trademark, registration and/or application, referenced above, and do all other lawful acts reasonably necessary to carry out the intent of this Assignment, as well as to provide such other material, information, and/or assistance to ASSIGNEE as will be considered reasonably necessary in connection therewith.

IN WITNESS WHEREOF, Assignor hereby executes this Assignment by its duly authorized officer at Seattle, Washington as of this 28<sup>th</sup> day of September, 2007.

VOTIVO, Ltd

By Edgar F. Lee  
Edgar F. Lee, President

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

On September 28, 2007, I certify that I know or have satisfactory evidence that Edgar F. Lee is the person who appeared before me, and he acknowledged that he signed the foregoing instrument as President and on behalf of VOTIVO, LTD., a Washington corporation, as his free and voluntary act and deed for the uses and purposes therein mentioned, being authorized to do so.

WITNESS my hand and official seal the date and year in this certificate written above.



Mark V. Jordan  
NOTARY PUBLIC in and for the State of  
Washington, residing at

SEATTLE  
My Commission expires: 4/29/2010

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**EXHIBIT B**

**FOR**

**ASSIGNMENT OF ITU TRADEMARK INTERESTS**

<b><u>Serial No.</u></b>	<b><u>Trademark Name</u></b>
76/613881	Mandarine
76/612571	Mandarin Grove

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# **EXHIBIT 15**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VOTIVO, LTD., a Washington corporation,

Plaintiff,

v.

TYLER CANDLE COMPANY, LLC, a Texas  
limited liability company,

Defendant.

NO. CVO3-2661P

DECLARATION OF EDGAR F. LEE  
IN SUPPORT OF PLAINTIFF'S  
RESPONSE TO DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND MEMORANDUM  
IN SUPPORT THEREOF

EDGAR F. LEE, declares and states as follows:

1. I am the President of VOTIVO, Ltd., over the age of eighteen (18) years and have personal knowledge of the following facts, and am competent to testify thereto.

2. I make this declaration in support of Plaintiff's Response to Tyler Candle Company's Motion for Summary Judgment and Memorandum in Support Thereof.

3. VOTIVO is a Washington corporation based in Seattle. VOTIVO is in the business of designing, manufacturing and wholesaling aromatic products, namely, scented candles under the trademarks RED CURRANT, GINGERED CURRANT, PAPERWHITE NARCISSUS, MANDARINE, and CLEAN CRISP WHITE, (the "Marks").

DECL. OF EDGAR F. LEE IN SUPP. OF PLTF'S RESPONSE TO  
DEF.'S MOT. FOR SUMM JUDGMENT - 1  
CASE NO. CVO3-2661P

INVICTA LAW GROUP, PLLC  
1000 SECOND AVENUE, SUITE 3310  
SEATTLE, WA 98104-1019  
FAX (206) 903-6365  
TEL (206) 903-6364

1           4.       Due to the continued strong sales and popular acclaim of the Marks,  
2 VOTIVO filed for federal trademark registrations for the Marks on April 11, 2002. VOTIVO  
3 was issued Trademark Registration No. 2,711,059 for CLEAN CRISP WHITE on April 29,  
4 2003; Registration Nos. 2,720,907 for RED CURRANT and 2,720,908 for MANDARINE on June  
5 3, 2003; Registration No. 2,731,597 for PAPERWHITE NARCISSUS on July 1, 2003; and  
6 Registration No. 2,749,670 for GINGERED CURRANT on August 12, 2003.

7           5.       VOTIVO maintains an aggressive intellectual property protection policy and  
8 vigorously defends its Marks against unlawful infringement by third parties.

9           6.       VOTIVO sells its aromatic products in the United States, Canada, and Europe  
10 through a network of approximately 11,900 retailers and distributors such as home furnishing  
11 boutiques, specialty gift stores and retail websites.

12          7.       The Marks are promoted in permanent showrooms throughout the United  
13 States in cities such as Columbus, Chicago, Minneapolis, Atlanta, Kansas City, Seattle, Los  
14 Angeles, New York, San Francisco and Dallas.

15          8.       VOTIVO spends approximately \$120,000 to \$150,000 per year promoting the  
16 Marks nationally and internationally at over 24 trade shows in cities such as Atlanta, Dallas,  
17 Los Angeles, Seattle, New York, San Francisco, Boston and Denver.

18          9.       These trade shows are attended by thousands of competing manufacturers and  
19 retailers in the aromatic products and gift industries. It is a common practice for attendees  
20 and participants of these trade shows to walk the shows to observe the booths of competitors  
21 and to stay aware of emerging trends in the market.  
22  
23

1           10.    The determination of an aromatic candle name is a highly creative process that  
2 is not always dictated by the precise fragrance ingredients of the candle. Instead, the candle  
3 scent name is usually inspired by emotions, moods, fantasies, or feelings evoked by a  
4 particular candle aroma.

5           11.    The aromatic candles manufactured and sold by VOTIVO are a mixture of  
6 various synthetic and natural compounds. These compounds contain top notes, middle notes,  
7 and base notes which are layered together to suggest certain moods, thoughts, and/or  
8 feelings. The interpretation of a particular candle aroma is highly subjective and different  
9 people often have different interpretations of the same candle aroma.

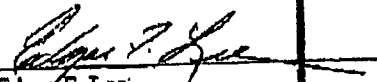
10          12.    In the past eight plus years that VOTIVO has been selling aromatic candles,  
11 not a single complaint has been received alleging that a candle scent name was  
12 misdescriptive of the actual candle scent. In addition, not a single complaint has ever been  
13 received alleging that a candle was defective because it did not actually contain the  
14 ingredient suggested by the candle scent name.

15          13.    To the best of VOTIVO's knowledge, there is no 100% natural Narcissus  
16 product on the market.

17          14.    In early January, 2003, VOTIVO discovered Defendant selling candles under  
18 the trade names Red Currant, Gingered Currant, Narcissus Paperwhite, Mandarin, and Crisp  
19 White.

20                I declare under penalty of perjury under the laws of the State of Washington that the  
21 foregoing is true and correct.  
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EXECUTED AT SAN FRANCISCO, CALIFORNIA this 7<sup>th</sup> day of February, 2005.

  
Edgar F. Lee

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DECL. OF EDGAR F. LEE IN SUPP. OF PLTF'S RESPONSE TO  
DEF.'S MOT. FOR SUMM JUDGMENT - 4  
CASE NO. CVO3-2661P

VOTL 78 ch070301

INVICTA LAW GROUP, PLLC  
1600 SECOND AVENUE, SUITE 3310  
SEATTLE, WA 98104-1019  
FAX (206) 403-6365  
TEL (206) 903-6304

# **EXHIBIT 16**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VOTIVO, Ltd., a Washington corporation,

Plaintiff,

v.

TYLER CANDLE COMPANY, LLC, a Texas  
limited liability company,

Defendant.

NO. CV03-2661P

DECLARATION OF HARRIS JONES  
IN SUPPORT OF PLAINTIFF'S  
RESPONSE TO TYLER CANDLE  
COMPANY'S MOTION FOR  
SUMMARY JUDGMENT AND  
MEMORANDUM IN SUPPORT  
THEREOF

HARRIS JONES, declares and states as follows:

1. I am the Vice President of and a perfumer with Aroma Creations, Inc., I am over the age of eighteen (18) years and have personal knowledge of the following facts and am competent to testify thereto.

2. I make this declaration in support of Plaintiff's Response to Defendant Tyler Candle Company's Motion for Summary Judgment.

DEC. OF HARRIS JONES IN SUPP. OF PLTF.'S RESP. TO  
TYLER CANDLE CO.'S MOT. FOR SUMM. JUDGMENT AND  
MEMO. IN SUPPORT THEREOF - 1 -

INVICTA LAW GROUP, PLLC  
1000 SECOND AVENUE, SUITE 3310  
SEATTLE, WA 98104-1019  
FAX (206) 903-6363  
TEL (206) 903-6364

1           3.     I have been in the fragrance industry for 21 years and have 18 years  
2 experience with respect to fragrances and candles. I am also a GCMS perfumer (Gas  
3 Chromatography - Mass Spectroscopy).

4           4.     Aroma Creations, Inc., is a fragrance developer and manufacturing business  
5 that specializes in creating fragrances for private label cosmetic industry purchasers,  
6 candle companies, and other diverse companies that utilize a multitude of fragrances in  
7 their manufacturing processes. These companies typically purchase from 25 – 200 kilos  
8 of fragrances from Aroma Creations, Inc.

9           5.     Research shows that fragrances and aromas can directly evoke strong  
10 emotions, moods and feelings in individuals.

11           6.     Fragrances created by Aroma Creations, Inc., are combinations composed  
12 from a pool of 2,000 synthetic and 300-600 natural compounds. These fragrance formulae  
13 are composed of various “notes” designed to hit olfactory receptors in much the same way  
14 that a musical note registers to the ear. When created, each fragrance may contain top  
15 notes, middle notes, and base notes which are layered together to elicit certain suggestive  
16 associations and/or feelings.

17           7.     When mixed, these scents are judged and tested using an in-house Hedonic  
18 Scale method and customer approval factor which is a very subjective test with a strong  
19 emphasis on a conceptual “it reminds me of” rather than a definitive “it is” olfactory  
20 association. Odor perception, i.e, olfactory associations, including intensity, is affected by  
21 imagery, word association, knowledge of odor source/familiarity, cultural differences, and  
22 experience-dependent factors.  
23

DEC. OF HARRIS JONES IN SUPP. OF PLTF.'S RESP. TO  
TYLER CANDLE CO.'S MOT. FOR SUMM. JUDGMENT AND  
MEMO. IN SUPPORT THEREOF - 2 -

INVICTA LAW GROUP, PLLC  
1000 SECOND AVENUE, SUITE 3310  
SEATTLE, WA 98104-3019  
FAX (206) 903-6365  
TEL (206) 903-6364

1 8. It is overly simplistic to claim that fragrances must contain certain  
2 ingredients to be authentic. It runs counter to our understanding of the Hedonic Scale and  
3 denies the actual nature of aromatic creation and design.

4 9. VOTIVO, Ltd. ("VOTIVO"), is a client of Aroma Creations, Inc. VOTIVO  
5 demands top quality in its aromatic scents and pays costs equivalent to high-end boutique  
6 and department stores "designer fragrance" costs for their fragrances. In my professional  
7 experience, VOTIVO was one of the first in the United States to pay this type of cost for a  
8 candle fragrance, and VOTIVO was Aroma Creations, Inc.'s first client to use such high-  
9 end fragrances within the candle industry.

10 I declare under penalty of perjury under the laws of the state of Washington that  
11 the foregoing is true and correct to the best of my knowledge and belief.  
12

13 EXECUTED at Sedro Wooley, Washington this 4th day of February 2005.

14 AROMA CREATIONS, INC.

15   
16 Harris Jones, Its Vice President

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DEC. OF HARRIS JONES IN SUPP. OF PLTF.'S RESP. TO  
TYLER CANDLE CO.'S MOT. FOR SUMM. JUDGMENT AND  
MEMO. IN SUPPORT THEREOF - 3 -

INVICTA LAW GROUP, PLLC  
1000 SECOND AVENUE, SUITE 3310  
SEATTLE, WA 98104-1019  
FAX (206) 903-6365  
TEL (206) 903-6366

# **EXHIBIT 17**

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8 THE HONORABLE MARSHA J. PECHMAN

9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

11 VOTIVO, Ltd., a Washington corporation,

12 Plaintiff,

13 v.

14 TYLER CANDLE COMPANY, LLC, a Texas  
15 limited liability company,

16 Defendant.

NO. CV03-2661P

DECLARATION OF DONALD O.  
BULKLEY IN SUPPORT OF  
PLAINTIFF'S RESPONSE TO  
TYLER CANDLE COMPANY'S  
MOTION FOR SUMMARY  
JUDGMENT AND MEMORANDUM  
IN SUPPORT THEREOF

17 DONALD O. BULKLEY, declares and states as follows:

18 1. I am President of Bulkley Associates, over the age of eighteen (18) years  
19 and have personal knowledge of the following facts, and am competent to testify thereto.

20 2. I make this declaration in support of Plaintiff's Response to Defendant  
21 Tyler Candle Company's Motion for Summary Judgment.

22 3. I am a manufacturer's representative and sell products primarily in the  
23 home décor and gift industry. I have been in the industry for 25 years.

1           4.     Bulkley Associates provides service to 300+ retailers including VOTIVO  
2 and other candle companies. I have been a representative for VOTIVO's products since  
3 January 1996.

4           5.     As a representative I attend trade shows, peruse stores to view market  
5 trends, and advise retailers on market strategies and product placement. It is a common  
6 practice for attendees and participants of trade shows to walk the shows to observe the  
7 booths of competitors and to stay aware of emerging trends in the market.

8           6.     In a trade show showroom setting, people strongly associate VOTIVO  
9 candle scent names exclusively with VOTIVO. Candle testers are commonly used to  
10 sample candle scents before they are purchased. When testers are not available,  
11 purchasers simply remove the lids of the candles to sniff the fragrance.

12           7.     In my 25 years in the industry, I have never been asked if a candle contains  
13 any actual juice or other literal elements of the name the fragrance represents. It has been  
14 my experience that purchasers of candles know little and care even less about the precise  
15 chemical components and ingredients which compose a candle. The average consumer  
16 purchases candles, specifically VOTIVO's products, based on the superior quality of the  
17 candles' scent and for the fame associated with the VOTIVO products.  
18  
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1 I declare under penalty of perjury under the laws of the state of Washington that  
2 the foregoing is true and correct to the best of my knowledge and belief.

3 EXECUTED at Seattle, Washington this 4<sup>th</sup> day of February 2005.

4  
5 BULKLEY ASSOCIATES

6 By Donald O. Bulkley  
7 Donald O. Bulkley, President  
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DEC. OF DONALD O. BULKLEY IN SUPP. OF PLTT'F  
RESP. TO TYLER CANDLE CO.'S MOT. FOR SUMM.  
JUDGMENT AND MEMO. IN SUPPORT THEREOF

- 3 -

# **EXHIBIT 18**

Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51 and 52

**United States Patent and Trademark Office**

**Reg. No. 2,728,815**

Registered June 24, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**MANDARINE**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

THE ENGLISH TRANSLATION OF "MANDAR-  
INE" IS "MANDARIN".

\* FOR: SKIN SOAP, SCENTED BODY SPRAY,  
SCENTED ROOM SPRAY, AND INCENSE, IN  
CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

SEC. 2(F).

SER. NO. 76-394,470, FILED 4-11-2002.

FIRST USE 1-2-1997; IN COMMERCE 1-2-1997.

ALICIA COLLINS, EXAMINING ATTORNEY

# **EXHIBIT 19**

Int. Cl.: 4

Prior U.S. Cls.: 1, 6 and 15

**United States Patent and Trademark Office**

**Reg. No. 2,720,908**

Registered June 3, 2003

**TRADEMARK  
PRINCIPAL REGISTER**

**MANDARINE**

VOTIVO, LTD. (WASHINGTON CORPORATION)  
3450 4TH AVENUE S.  
SEATTLE, WA 98134

FOR: CANDLES AND TAPERS. IN CLASS 4 (U.S.  
CLS. 1, 6 AND 15).

FIRST USE 1-2-1997; IN COMMERCE 1-2-1997.

THE ENGLISH TRANSLATION OF "MANDAR-  
INE" IS "MANDARIN".

SEC. 2(F).

SER. NO. 76-394,471, FILED 4-11-2002.

ALICIA COLLINS, EXAMINING ATTORNEY

# **EXHIBIT 20**

**TRADEMARK APPLICATION**  
(Principal Register; Intended Use)

**Mark: MANDARINE**  
**Class No.: 003**

To the Commissioner of Patents and Trademarks:

VOTIVO, LTD.

A corporation organized under the laws of the state of Washington  
3450 4<sup>th</sup> Avenue S.  
Seattle, WA 98134

The above-identified applicant requests registration of the trademark shown in the accompanying drawing for

**Bath salts and hand lotion**

and requests that said mark be registered in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 as amended.

The basis for this application is that applicant has a bona fide intention to use the mark in commerce on or in connection with the above-identified goods. (15 U.S.C. § 1051(b).) The manner or mode in which applicant intends to use the mark on or in connection with the goods is by applying it to packaging, websites, brochures and in other ways customary in the trade.

Applicant is the owner of U.S. Patent and Trademark Office Registration Nos. 2728815 and 2720908.

Applicant hereby appoints Mark V. Jordan, attorney at law, with the law firm Invicta Law Group, PLLC, 1000 Second Avenue, Suite 3310, Seattle, Washington 98104-1019, telephone: (206) 903-6364, fax: (206) 903-6365, to prosecute this application to register, to transact all business in the Patent and Trademark Office in connection therewith, and to receive the certificate of registration.

EDGAR F. LEE, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any registration resulting therefrom, declares:

That he is President of said corporation; that he believes said corporation to be the owner of the trademark sought to be registered; that applicant had bona fide intention to use the mark in commerce on or in connection with the goods listed in the application since the filing date of the application; that to the best of his knowledge and belief no other person, firm, corporation, or association has the right to use said mark in commerce, either in the identical form or in such near resemblance thereto as may be likely, when applied to the goods of such other person, to cause confusion, or to cause mistake, or to deceive; that the facts set forth in this application are true; and that all statements made of his own knowledge are true and that all statements made on information and belief are believed to be true.

VOTIVO, LTD.

September 22, 2004  
Date

By Edgar F. Lee  
Edgar F. Lee, Its President

Applicant's Name:

VOTIVO, LTD.

Applicant's Address:

3450 4<sup>th</sup> Avenue S.  
Seattle, WA 98134

The Goods:

Bath salts and hand lotion

The mark is presented in standard character format without claim to any particular font style, size, or color.

DRAWING PAGE

**MANDARINE**



**UNITED STATES  
POSTAL SERVICE.**

Date: 10/06/2004

SARA ZIMMERMAN:

The following is in response to your 10/06/2004 request for delivery information on your Express Mail item number ED32 6824 762U S. The delivery record shows that this item was delivered on 09/30/2004 at 11:18 AM in ARLINGTON, VA 22202 to D BARFIELD. The scanned image of the recipient information is provided below.

Delivery Section

Signature of Recipient:

D. Barfield  
D. BARFIELD

Address of Recipient:

PTD 2980

Thank you for selecting the Postal Service for your mailing needs. If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,

United States Postal Service

# **EXHIBIT 21**

**UNITED STATES PATENT AND TRADEMARK OFFICE**

MAY - 3 2005

SERIAL NO: 76/613881

APPLICANT: VOTIVO, LTD.



**CORRESPONDENT ADDRESS:**

MARK V. JORDAN  
INVICTA LAW GROUP, PLLC  
1000 2ND AVE STE 3310  
SEATTLE WA 98104-1019

**RETURN ADDRESS:**

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

MARK: MANDARINE

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:

MAY - 5 2005

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

**EXAMINER'S AMENDMENT/PRIORITY ACTION**

RE: Serial Number 76613881

**QUESTIONS:** Please contact the assigned attorney with any additional questions.

**RESPONSE TIME LIMIT:** TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE. *If Applicant responds to the issues below within two months of the above mailing or e-mailing date, this case will be given priority handling.*

**ADVISORY—AMENDMENTS TO GOODS:** If the goods have been amended below, any future amendments must be in accordance with 37 C.F.R. § 2.71(a) and TMEP § 1402.07(e).

**OFFICE RECORDS SEARCH—NO CONFLICTING MARKS**

The Office records have been searched and no similar registered or pending mark has been found that would bar registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) (2003). TMEP § 704.02.

**EXAMINER'S AMENDMENT**

**AMENDMENTS AUTHORIZED:** As authorized by, Mark V. Jordan, Esq., on April 27, 2005, the application is amended as noted below. *If Applicant disagrees with or objects to any of the*

amendments below, please notify the undersigned attorney immediately, otherwise, no response is necessary. See TMEP § 707.

### **TRANSLATION OF FOREIGN WORDING**

The following translation statement is added to the record:

The English translation of the French word "MANDARINE" is "MANDARIN."

37 C.F.R. § 2.61(b); see TMEP § 809.

### **CLAIM OF OWNERSHIP OF PRIOR REGISTRATION**

The following claim of ownership is added to the record:

Applicant is the owner of U.S. Registration No. 2728815.

37 C.F.R. § 2.36; TMEP § 812.

### **PRIORITY ACTION**

Applicant must respond to each requirement or refusal raised below. If Applicant responds to the issues below within two months of the above mailing or e-mailing date, this case will be given priority handling. TMEP §§ 708.01, 708.05.

### **REGISTRATION REFUSAL—MERELY DESCRIPTIVE OR MISDESCRIPTIVE**

Registration is refused pursuant to Section 2(e)(1) of the Trademark Act because the proposed mark merely describes an ingredient of Applicant's goods. 15 U.S.C. § 1052(e)(1); see TMEP §§ 1209.01(b), 1209.03(k).

In the present case, Applicant applied to register the mark "MANDARINE" for goods in International Class 3, to wit, "bath salts and hand lotion."

Pursuant to Section 2(e)(1), a mark that merely describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods or services is merely descriptive and therefore refused registration on the Principal Register. 15 U.S.C. § 1052(e)(1); see *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979).

Applicant's mark is the word "MANDARINE;" mandarin oil (or mandarine oil) is a common natural ingredient in cosmetics, perfumery, and skincare and bath products, promoted in the personal care industry for balancing and toning the skin. See, e.g., *Naturally Based Skin Care, SOAP & COSMETICS*, July 1, 1999, at 19; see attached evidence from LexisNexis™, Google™ and other Internet sites. Since the proposed mark identifies an ingredient contained in Applicant's goods, it is therefore merely descriptive. For this reason, Applicant's mark is refused registration on the Principal Register.

In the alternative, registration is refused because the proposed mark is deceptively misdescriptive of Applicant's goods. See TMEP § 1209.04. A mark is deceptively misdescriptive if it describes an ingredient, quality, characteristic, function or feature of the relevant goods or services, and the description conveyed by the mark is both false and plausible. *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412 (TTAB 1987) (CAMEO held deceptively misdescriptive of jewelry); *In re Ox-Yoke Originals, Inc.*, 222 USPQ 352 (TTAB 1983) (G.I. held deceptively misdescriptive of gun cleaning patches, rods, brushes, solvents and oils). If mandarin oil is not an ingredient in Applicant's goods and the idea conveyed by the mark is false and plausible, then the mark is deceptively misdescriptive. Marks that have been refused registration pursuant to Section 2(e)(1) on the ground of deceptive misdescriptiveness may be registrable on the Principal Register under Section 2(f) upon a showing of acquired distinctiveness, or on the Supplemental Register. 15 U.S.C. §§ 1052(f), 1091. However, marks that are deceptive under Section 2(a) are not registrable on either the Principal Register or the Supplemental Register under any circumstances.

Although the examining attorney has refused registration, Applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

#### **REGISTRATION PURSUANT TO SECTION 2(F) BASED ON PRIOR REGISTRATION**

Applicant may seek Principal Register registration under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), by claiming acquired distinctiveness through ownership of U.S. Registration 2728815.

To do so, applicant must submit the following statement, if accurate:

The mark has become distinctive of the goods as evidenced by ownership of U.S. Registration 2728815 on the Principal Register for the same mark for related goods.

37 C.F.R. § 2.41(b); see TMEP § 1212.04.

#### **GENERAL INFORMATION**

##### **NOTICE: FEE CHANGE**

Effective January 31, 2005, and pursuant to the Consolidated Appropriations Act, 2005, Pub. L. 108-447, the following are the fees that will be charged for filing a trademark application:

- (1) \$325 per international class if filed electronically using the Trademark Electronic Application System (TEAS); or
- (2) \$375 per international class if filed on paper

These fees will be charged not only when a new application is filed, but also when payments are made to add classes to an existing application. If such payments are submitted with a TEAS response, the fee will be \$325 per class, and if such payments are made with a paper response, the fee will be \$375 per class.

The new fee requirements will apply to any fees filed on or after January 31, 2005.

## **NOTICE: TRADEMARK OPERATION RELOCATION**

The Trademark Operation has relocated to Alexandria, Virginia. Effective October 4, 2004, all Trademark-related paper mail (except documents sent to the Assignment Services Division for recordation, certain documents filed under the Madrid Protocol, and requests for copies of trademark documents) must be sent to:

**Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Applicants, attorneys and other Trademark customers are strongly encouraged to correspond with the USPTO online via the Trademark Electronic Application System (TEAS), at <http://www.uspto.gov/teas/index.html>.

/Judy Helfman/  
Judith M. Helfman  
USPTO - Trademarks  
Law Office 114  
(571) 272-5892 direct line

### **HOW TO RESPOND TO THIS OFFICE ACTION:**

- **ONLINE RESPONSE:** You may respond formally using the Office's Trademark Electronic Application System (TEAS) Response to Office Action form (visit <http://www.uspto.gov/teas/index.html> and follow the instructions, but if the Office Action has been issued via email, you must wait 72 hours after receipt of the Office Action to respond via TEAS).
- **REGULAR MAIL RESPONSE:** To respond by regular mail, your response should be sent to the mailing return address above and include the serial number, law office number and examining attorney's name in your response.

**STATUS OF APPLICATION:** To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov>.

**VIEW APPLICATION DOCUMENTS ONLINE:** Documents in the electronic file for pending applications can be viewed and downloaded online at <http://portal.uspto.gov/external/portal/tow>.

**GENERAL TRADEMARK INFORMATION:** For general information about trademarks, please visit the Office's website at <http://www.uspto.gov/main/trademarks.htm>

[http://www.lexis.com/research/retrieve/frames?\\_m=b441e7f40af931df74a386cede5dc&csvc=bl&cform=bool&fmtstr=F](http://www.lexis.com/research/retrieve/frames?_m=b441e7f40af931df74a386cede5dc&csvc=bl&cform=bool&fmtstr=F)

[ULL&docnum=1&startdoc=1&wchp=dGLbVlb-zSkAA&md5=2320accda6e7a959901afb9f2350ce7](#)

04/29/2005 12:34:01 PM

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FOCUS Terms: mandarin oil

Search Within: All Documents

Go FOCUS Options

View: KWIC ± 25 | Full | Custom

1 of 1

FAST Print Print Download Fax Email Text On

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Cosmetics and Toiletries June, 1992 (Copy w/ Cite)

Pages:

Source: [News & Business > News > News, All \(English, Full Text\)](#)

Terms: [mandarin oil](#) (Edit Search)

### *Cosmetics and Toiletries June, 1992*

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ASAP

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Cosmetics and Toiletries

June, 1992

SECTION: Vol. 107 ; No. 6 ; Pg. 49; ISSN: 0361-4387

LENGTH: 2877 words

HEADLINE: Fragrances and VOC regulations; volatile organic compounds emissions regulations affecting fragrance industry

#### BODY:

... fragrance materials are complex mixtures of many organic compounds. For example, \* Jasmin oil contains about 400 known chemical compounds. \* Rose oil contains about 275 known chemical compounds. \* **Mandarin oil** contains about 120 known chemical compounds. \* Bergamot oil contains more than 65 known chemical compounds.

These natural materials contain organic chemicals such as terpenes, alcohols, esters, aldehydes, ketones, ethers and ...

Source: [News & Business > News > News, All \(English, Full Text\)](#)

Terms: [mandarin oil](#) (Edit Search)

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St. Louis Post-Dispatch (Missouri) September 30, 2004 Thursday Five Star Late Lift Edition (Copy w/ Cite) Pages:

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St. Louis Post-Dispatch (Missouri) September 30, 2004 Thursday Five Star Late Lift Edition

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September 30, 2004 Thursday Five Star Late Lift Edition

**SECTION:** EVERYDAY MAGAZINE; Pg. F04

**LENGTH:** 17 words

**HEADLINE:** fragrances flourish

**BYLINE:** Compiled Lisa Jones Townsel

**BODY:**  
Complete your look this season with a fragrance that fits your mood, style and scents-abilities.

**GRAPHIC:** photo; (1) Color Photo - The spotlight shines on YVES SAINT LAURENT'S CINEMA eau de parfum spray (\$60, 1.6 fl. oz, Saks Fifth Avenue and select department stores after Friday), which is decidedly a floral essence building on hints of clementine, almond tree blossoms, amaryllis and amber. (2) Color Photo - PRADA'S heady scent by the same name (\$65, 1.7 eau de parfum spray, Neiman Marcus) is sweetly mellow thanks to essences of bergamot and mandarin oils, rose, patchouli and sandalwood. (3) Color Photo - CLEAN PROVENCE attempts to capture the pristine scent of "pure soap and water" with its new French milled soap fragrance eau de parfum (\$76, 2.14 fl oz., [www.cleanperfume.com](http://www.cleanperfume.com), Nordstrom and Sephora, West County Center). (4) Color Photo - DAVIDOFF COOL WATER DEEP (\$42, 1.7 fl oz Famous-Barr, Dillard's) is coined as a woody aromatic with hints of mandarin, clary sage, cedar, hinoki woods and white musk. (5) Color Photo - KENNETH COLE'S REACTION (\$42.50, 1.7 fl oz, department stores and Kenneth Cole New York, St. Louis Galleria) is a clean, after-shower spritz. Fruity scents of lime, green apple and watermelon provide a playfulness to balance the more serious patchouli and musk undertones. (6) Color Photo - RALPH LAUREN'S highly refined LAUREN STYLE has quirky combinations of tangerine and kumquat, lime and orange flower, gardenia, patchouli and musk (\$47.50, 2.5 fl oz., department stores and at [www.polo.com](http://www.polo.com)).

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## Mandarin oil as skincare ingredient

Mandarin oil is extracted from *Citrus reticulata* (also known as *Citrus nobilis*, *madurensis*, *unshiu*, *deliciosa*) and is used in some specialized skincare and cosmetic products.

**Dermaxime**  
The natural choice in skin care

Mandarin oil is sweet and tangy and the color of the oil yellowy orange and the main chemical components of Mandarin oil are  $\alpha$ -pinene, camphene, sabinene,  $\beta$ -pinene, myrcene, limonene, linalool, citronellal, terpineol-4-ol, nerol and geraniol.

### The therapeutic properties of mandarin oil

Therapeutic properties of mandarin oil in skincare are antiseptic and tonic.

It is a great ingredient to help purify and re-balance the skin and for promoting a fine textured skin, while at the same time fighting minor infections and skin problems.

Using high concentrations of Mandarin oil, could cause photo-sensitivity when the skin is exposed for a period of time to sunlight, and although the concentration used in our products does not reach that level, we would however advise not to sunbathe while using the Problem Skin Moisturizing Day Gel.

### Mandarin essential oil is used in the following products:

- Problem Skin Wash
- Problem Skin Night Cream
- Problem Skin Moisturizing Day Gel

Some manufacturers claim to have no preservatives in their products, which would make for a very unstable and unsafe product, while on the other hand, some misinformation is circulated on the internet regarding cosmetic ingredients, and with this in mind we supply full particulars regarding each ingredient used in our products to place it all in perspective.

Please see our page regarding our formulations. We further believe that our clients have the right to know about all the ingredients used in our products.

$\alpha$  Bisdolol  
Almond oil

Ingredients:

Aloe vera oil  
Alpha hydroxy acid  
Alpha lipoic acid  
Alum  
Aluminum potassium sulphate  
Ammonia lauryl sulphate  
Apricot kernel oil  
Apricot kernel powder  
Aqua  
Avocado oil  
Beeswax  
Benzoin oil  
Bergamot oil  
Borage oil  
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Carbomer  
Carrot seed oil  
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Chamomile oil  
Clary sage oil  
Cypress oil  
Dehydroacetic acid  
EDTA  
Elder flower extract  
Elemi oil  
Ethanol  
Evening primrose oil  
Fennel oil  
Frankincense oil  
Geranium oil  
Ginkgo biloba extract  
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Chain Drug Review September 28, 1998 (Copy w/ Cite) Pages:

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*Chain Drug Review September 28, 1998*

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Chain Drug Review

September 28, 1998

SECTION: No. 16, Vol. 20; Pg. 33; ISSN: 0164-9914

IAC-ACC-NO: 54105128

LENGTH: 1201 words

HEADLINE: Category takes on new look.


BODY:

... All four of the body products are formulated to have moisturizing properties.

Sunny's scent is described as a clean, bright floral with a zesty touch of citrus. Its notes include essential oils of osmanthas, mimosa and Italian mandarin oil. The fragrance is said to evoke "a sun-kissed meadow on a golden morning."

The suggested prices for the products in the line range from \$ 10.95 for the 1.8-ounce cologne spray to \$ 4.15 ...

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Soap & Cosmetics July 1, 1999

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Soap & Cosmetics

July 1, 1999

SECTION: No. 7, Vol. 75; Pg. 19

IAC-ACC-NO: 55360830

LENGTH: 193 words

HEADLINE: NATURALLY BASED SKIN CARE; Brief Article

BODY:

L'Occitane has launched a new line of body and skin care products. Products are classified according to the skin type it is intended for. For normal skin, the company offers Gentle Make-Up Remover Cream-Gel, with lemon, eucalyptus, juniper, lavender, ylang ylang and mandarin oils; Toning Lotion, an alcohol-free lotion with a gentle astringent; Moisturizing Active Care, with UVA and UVB protection; and Moisturizing Radiance Face Mask. For dry/sensitive skin, the company has developed Very Mild Cleansing Lotion, which contains essential oils, shea butter and almond extract; Gentle Calming Spray; Nourishing Protective Care, with evening primrose oil and UVA/UVB filters; and Soothing Exfoliating Face Mask. To treat combination/oily skin, it offers Purifying Foaming Gel, a gentle gel that cleanses the skin and closes the pores; Clarifying Toner; Lavender Vinegar, an astringent lotion that is rich in essential oils; Matte Finish Rebalancing Cream, which helps compensate sebaceous imbalances; and Clarifying and Exfoliating Face Mask. There are also specialized products such as anti-aging and eye care. Prices range from \$ 15 to \$ 34.

IAC-CREATE-DATE: August 30, 1999

LOAD-DATE: August 31, 1999

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Some specialized skincare and cosmetic formulas include Mandarin ...

**Mandarin oil** is included as a skincare and cosmetic ingredient since it helps to purify and re-balance the skin, while promoting a fine textured skin and ...

[www.dermaxine.com/mandarin\\_oil.htm](http://www.dermaxine.com/mandarin_oil.htm) - 19k - [Cached](#) - [Similar pages](#)

Mandarin Aromatherapy Essential Oil by Power Health, Aromatherapy, UK

... of York (Power Health Products) have produced this high quality Aromatherapy oil by carefully blended pure essential **Mandarin oil** with Sweet Almond Oil. ...

[www.worldwideshoppingmail.co.uk/body-soul/mandarin-aromatherapy-essential-oil.asp](http://www.worldwideshoppingmail.co.uk/body-soul/mandarin-aromatherapy-essential-oil.asp) - 22k -

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Mandarin oil supplies and aromatherapy resources from Aromatic.

**Mandarin oil**, sourced from the highest quality producers. Shipped internationally. Make your own natural essential oil recipes.

[www.aromatic.co.uk/info/mandarin-oil.htm](http://www.aromatic.co.uk/info/mandarin-oil.htm) - 14k - [Cached](#) - [Similar pages](#)

Mandarin Oil

... **Mandarin Oil**. > printer friendly version. Copyright © HealthPoint. Introduction Botanical name - Citrus reticulata var mandarin. ...

[au.health.yahoo.com/041101/25/1usv.html?r=967507545](http://au.health.yahoo.com/041101/25/1usv.html?r=967507545) - 29k - [Cached](#) - [Similar pages](#)

Mandarin Oil 13ml

Mandarin is a strengthening and soothing oil that fosters a sense of tranquillity. It is an excellent digestive remedy. It is known on France as the ...

[www.discountnaturalhealth.com/prod1363.htm](http://www.discountnaturalhealth.com/prod1363.htm) - 18k - [Cached](#) - [Similar pages](#)

Natural skin care products using the Essential Oil Mandarin

... **Mandarin Oil** is part of the suite of essential oils used in body toning ... **Mandarin oil** is a gentle restorative, sedative and tonic and has been used ...

[www.wildcrafted.com.au/Mandarin.html](http://www.wildcrafted.com.au/Mandarin.html) - 20k - [Cached](#) - [Similar pages](#)

mandarin oil

... Synonyms: citrus reticulata blanco var **mandarin oil** italv Order Description: Fresh

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... Synonyms : citrus reticulata blanco var. **mandarin oil** italy. Odor Description : , Fresh Orange Mandarin. Appearance : , Pale Yellow Liquid ...  
[www.thegoodscentscompany.com/data/es1000011.html](http://www.thegoodscentscompany.com/data/es1000011.html) - 4k - [Cached](#) - [Similar pages](#)

#### Mandarin essential oil (Citrus reticulata) - information on the ...

Look at this page for all the information on **Mandarin oil**, and what it can be used ...

**Mandarin oil** is extracted from Citrus reticulata (aka Citrus nobilis, ...

[www.essentialoils.co.za/essential\\_oils/mandarin.htm](http://www.essentialoils.co.za/essential_oils/mandarin.htm) - 16k - [Cached](#) - [Similar pages](#)

#### Mandarin Oil - Green From Well Naturally Products -

**Mandarin oil** - Citrus nobilis, produced in Italy by expression from the peel, reputed properties include: Antiseptic, antispasmodic, carminative, digestive, ...

[www.wellnaturally.ca/essential\\_oils/mandarin\\_oil.html](http://www.wellnaturally.ca/essential_oils/mandarin_oil.html) - 12k - [Cached](#) - [Similar pages](#)

#### Mandarin Essential Oil from Natural Healing

... Pressed from the peels, **mandarin oil** emits a flowery, sweet aroma, ... **Mandarin oil** is slightly yellow and leaves a residue in the aroma lamp. ...

[www.pride-net.com/oils/mandarin.htm](http://www.pride-net.com/oils/mandarin.htm) - 4k - [Cached](#) - [Similar pages](#)

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## Mandarin Oil

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### Introduction

Botanical name - Citrus reticulata var mandarin.

This essential oil is extracted from the fruit peel by cold pressing.

### About

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Native to southern China and Far East Asia, Mandarin was later introduced to Europe and America.

Taking its name from the glowing orange coloured fruit traditionally offered by the Chinese to their dignitaries, the cold pressed peel of *Citrus reticulata* var *mandarin* yields an exquisite, saffron coloured oil holding a mouth-watering, sweet yet tangy fragrance. This is a Top to Middle Note.

#### Notes

The following applications assume that a high quality oil is being used. Please read the information topic on Aromatherapy - Essential Oils.

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[www.choice.com.au](http://www.choice.com.au)

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# **EXHIBIT 22**

May 17, 2005

Mark V. Jordan  
Email: mjordan@invictalaw.com

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Attn: Judith M. Helfman, Law Office 114

**Re: Mark: Mandarin**  
**Serial No.: 76/613881**  
**Applicant: VOTIVO, Ltd.**  
**Paper Filed: Response to Action No. 1 (Mailing date: 05/03/05)**

Dear Ms. Helfman:

This is a response to Action No. 1, dated May 3, 2005:

**Acquired Distinctiveness.** Under 37 C.F.R. §2.41(b); TMEP §§1212.04 et seq., Applicant asserts that the mark has acquired distinctiveness through ownership of its prior U.S. Registration and submits the following statement:

The mark has become distinctive of the goods as evidenced by ownership of U.S. Registration No. 2,728,815 on the Principal Register for the same mark for related goods or services.

If you would like to discuss this matter further, please call me. Thank you for considering the foregoing response to your letter.

Very truly yours,

INVICTA LAW GROUP, PLLC

  
Mark V. Jordan

MVJ:zm

cc: VOTIVO, Ltd.  
Mr. David Friesen

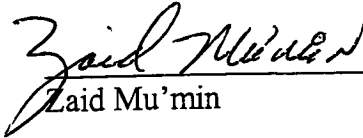
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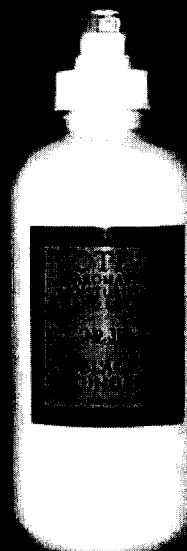
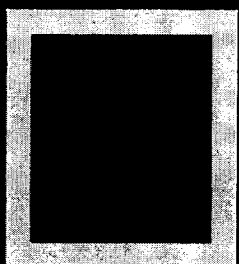
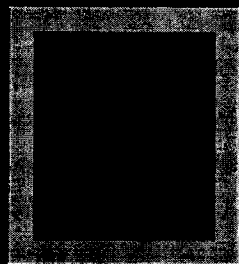
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Skin Care










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Sundries

Votivo

Found 88 Products.  
Showing products 61 thru 80

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	Brand	Description	Price		
	VOTIVO	MANDARINE HAND LOTION 12 oz.	\$17.95	Add to Cart	Add to Wishlist
	VOTIVO	MANDARINE LIQUID HAND SOAP 12 oz.	\$15.95	Add to Cart	Add to Wishlist
	VOTIVO	MANDARINE ROOM MIST 4 oz.	\$13.95	Add to Cart	Add to Wishlist
	VOTIVO	MOROCCAN FIG AROMATIC CANDLE 7.3 oz.	\$24.95	Add to Cart	Add to Wishlist
	VOTIVO	MOUNTAIN SPRINGWATER CANDLE 7.3 oz.	\$24.95	Add to Cart	Add to Wishlist
	VOTIVO	PONDICHERRY SANDALWOOD CANDLE 7.3 oz.	\$24.95	Add to Cart	Add to Wishlist
	VOTIVO	PURPLE PASSION FRUIT CANDLE 7.3 oz.	\$24.95	Add to Cart	Add to Wishlist
	VOTIVO	RAIN AROMATIC CANDLE 7.3 oz.	\$24.95	Add to Cart	Add to Wishlist
	VOTIVO	RAIN BURNING STICKS 20 ct	\$11.95	Add to Cart	Add to Wishlist
	VOTIVO	RAIN ROOM MIST	\$13.95	Add to	Add to

No. 73 \$25.00Add to Cart



**Votivo Aromatic Candle - Pandicherry Sandalwood**

Upon entering the antique shop, she immediately...

No. 94 \$25.00Add to Cart

No. 41 \$25.00Add to Cart

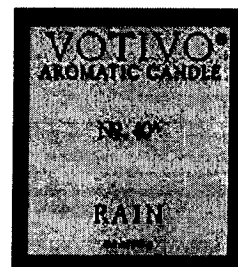


**Votivo Aromatic Candle - Purple Passionfruit**

A tantalizing blend of sugar spun pink cotton c...

No. 51 \$25.00Add to Cart

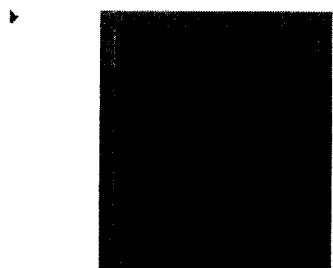
No. 64 \$25.00Add to Cart



**Votivo Aromatic Candle - Rain**

A subtle essence of the Carolina cape on a damp...

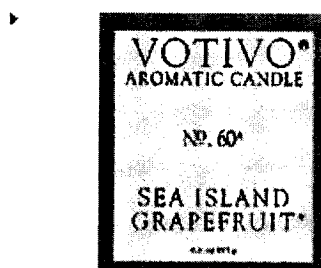
No. 40 \$25.00Add to Cart



**Votivo Aromatic Candle - Red Currant**

A savory blend of tart red currants and golden ...

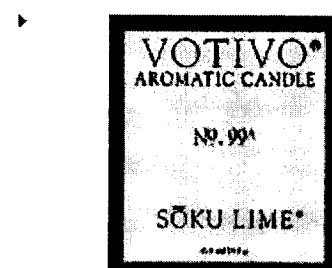
No. 96 \$25.00Add to Cart



**Votivo Aromatic Candle - Sea Island Grapefruit**

A burst of freshly squeezed ruby red grapefruit...

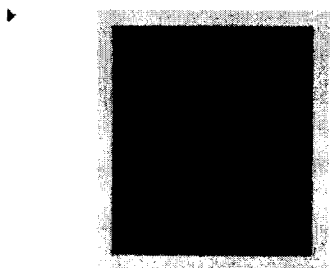
No. 60 \$25.00Add to Cart



**Votivo Aromatic Candle - Soku Lime**

An invigorating concoction of tart summertime l...

No. 99 \$25.00Add to Cart



**Votivo Aromatic Candle - Sweet Almond & Blood Orange**

A cake batter blend of aromatic almonds, sweetl...

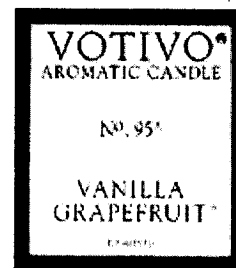
No. 98 \$25.00Add to Cart



**Votivo Aromatic Candle - Teak**

An aromatic blend of coarsely chopped dried her...

No. 37 \$25.00Add to Cart

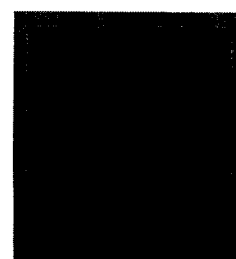
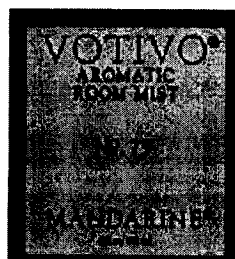
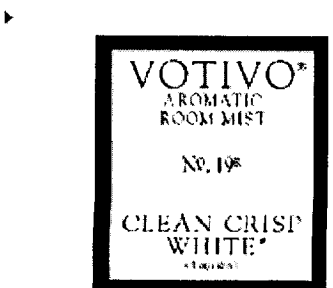


**Votivo Aromatic Candle - Vanilla Grapefruit**

The invigorating scent of tropical green leaves...

No. 95 \$25.00Add to Cart

## Votivo - Home Fragrance



**Sensia**

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## Mandarine Lotion - Votivo

**Item# 84379****Price: \$19.00**

The smell of sunshine. A luxurious blend of Olive Fruit Oil and Glycerin seals moisture into your hands and gives skin protection from the elements, while aloe vera softens and soothes. Feels great on elbows, knees and other parts too! Enriched with Vitamins A, C and E. Twelve ounces of silky, fragrant moisturizer. Cruelty free - never tested on animals! Made in the USA.

[Click here to add this item to your wishlist!](#)[Click here to Tell a Friend!](#)SHIP THIS ITEM TO:  
mePRICE: QTY:  
\$19.00 1[Continue Shopping](#)

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**BATH & BODY**

BATH &amp; BODY by Brand ...

Archipelago Botanicals  
 Aromaffloria  
 Aroma Vera  
 Baieido Zukoh Powder  
 Common Sense  
 Demeter Fragrance  
 Dresdner Essenz  
 Firefly Creations  
 Glitz (by Soular Therapy)  
 Jane  
 L'Aromarine  
 Lothantique  
 Nadina's Cremes  
 Nag Champa  
 Naked Bee  
 Place on Earth  
 Shadow & Light  
 Sensia Soaps  
 Tact Olive Oil Soaps  
 Ten Thousand Waves  
 Votivo  
 Zents

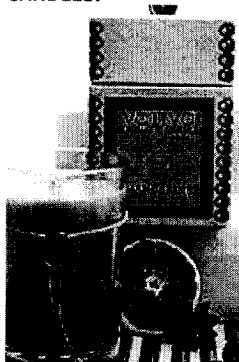
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Every Time



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also available...  
Votivo  
CANDLES!



...and Votivo  
INCENSE ...

## VOTIVO® Bath & Body



### VOTIVO® MOISTURIZING HAND LOTION

Votivo signature fragrances in a Moisturizing Hand and Body Lotion. Comes in a generous 12 ounce plastic pump bottle.

\$19 each

Clean Crisp White

[more info](#)[order](#)

Deep Clover

[more info](#)[order](#)

Honeysuckle

[more info](#)[order](#)

Mandarine

[more info](#)[order](#)

Red Currant

[more info](#)[order](#)

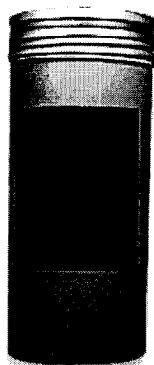
Sea Island Grapefruit

[more info](#)[order](#)

Vanilla Grapefruit

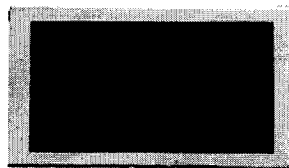
[more info](#)[order](#)

### VOTIVO'S RED CURRANT in Bath Salts and Soaps, too!



#### Red Currant AROMATIC BATH SALTS

Naturally derived Sea Salts contain soothing Aloe Vera and Plant Antioxidants that help smooth and protect the skin. Packaged in an apothecary style plastic



#### RED CURRANT AROMATIC MOISTURIZING SOAP

Luxurious, skin-softening soap bar envelopes your body in delicious fragrance. Enriched with Shea Butter, Vitamin E and



#### Red Currant MOISTURIZING HAND LOTION

Votivo signature fragrances in a Moisturizing Hand and Body Lotion. Comes in a generous 12 ounce plastic pump bottle. \$19 each

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**BATH & BODY**

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Archipelago Botanicals  
 Aromafloria  
 Aroma Vera  
 Baieido Zukoh Powder  
 Common Sense  
 Demeter Fragrance  
 Dresdner Essenz  
 Firefly Creations  
 Glitz (by Soular Therapy)  
 Jane  
 L'Aromarine  
 Lothantique  
 Nadina's Cremes  
 Nag Champa  
 Naked Bee  
 Place on Earth  
 Shadow & Light  
 Sensia Soaps  
 Tact Olive Oil Soaps  
 Ten Thousand Waves  
 Votivo  
 Zents

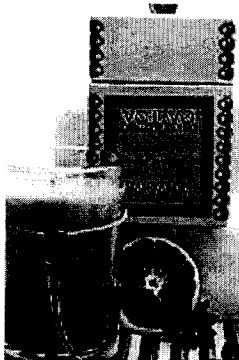
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## VOTIVO® Bath & Body



### VOTIVO® MOISTURIZING HAND LOTION

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\$19 each

Clean Crisp White

[more info](#)[order](#)

Deep Clover

[more info](#)[order](#)

Honeysuckle

[more info](#)[order](#)

Mandarine

[more info](#)[order](#)

Red Currant

[more info](#)[order](#)

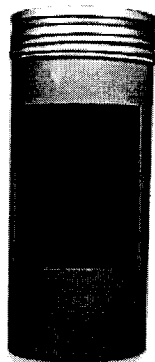
Sea Island Grapefruit

[more info](#)[order](#)

Vanilla Grapefruit

[more info](#)[order](#)

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Votivo signature fragrances in a Moisturizing Hand and Body Lotion. Comes in a generous 12 ounce plastic pump bottle. \$19 each



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## Product Detail

Free Shipping

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### Votivo's Votivo Moisturizing Lotion - Mandarinine

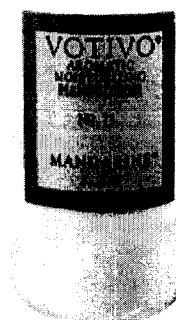
Item Number: **12 oz**

Quantity: 1

Price: **\$19.00**

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Vibrant citrus will dazzle the room. Olive fruit oil and glycerin bind moisture to the skin for protection from environmental damage, while aloe vera softens and smoothes. Enriched with vitamins A,C and E.

[Click here to see all other Lotions Products](#)

#### PLANET BEAUTY IS PROUD TO PRESENT PRODUCTS FROM THESE MANUFACTURES

| Abba | Alba Botanica | Alfaparf | Amazing Concealer | AminoGenesis | Anastasia | Anthony | Anthony Sport | Archipelago | Babylliss | Barielle | BeautyBlender | Bed Head | Big Sexy Hair | Bio Ionic | Bioelements | Bliss | Candle Warmer | Cargo Cosmetics | Caruso Professional | Cellex-C | Cellulite Rx | Claus Porto | CLEAN | Colure | Comodynes | ComptoirSudPacifique | Crazylibellule | Crede | Cricket | Crome | Crystal Body | Curly Sexy Hair | Cyclic Soap | DDF | Dermablend | DERMAdoctor | Dermalogica | DermaNew | Dr.Grandel | Ecoly | Enjoy | ERA Face Foundation | Evian | Evolution skin | Fake Bake | Fashion Formula | FHI Heat | Flavours Self Tanner | Foot Petals | Frederic Fekkai | Freeze | Frownies | GHD | Go Smile | Goldwell | Guinot | Hai | Hayashi Systems | Healthy Sexy Hair | Helen of Troy | Hempz | HollywoodFashionTape | Hot Sexy Hair | Hot Spa | Hot Tools | Hot Touch | HydroPeptide | Hylexin | Ice | Icon | Idebenol | Illuminare | Jack Black | Japonesque | Jessica Simpson | Joico | Jolen | Jonathan Hair Care | Juice Beauty | Kai | Kerastase | Kiss Me Mascara | Kms California | Komenuka Bijin | Lanza | Lip Fusion | Lip Scrub Sarah Happ | Lippman | Loccitane | Longcils | Mama Mio | Mason Pearson | Maui Babe | Mavala | MD Lash Factor | MD Skincare | MEHAZ | Monavie | Moroccan Oil | Murad | Mustela | Nailtiques | Napoleon Perdis | NuFace | Nyce Legs | Ojon | Orly | Osis | per-fekt | Phyto | Pure Fiji Spa | Pureology | Rene Furterer | Revitalash | Rilastil | Satin Haircolor | Scentual Expressions | Short Sexy Hair | Solano | Sorbie | Spa Girl | St Tropez | Straight Sexy Hair | StriVectin | Supersmile | Sweet Lacquer | SweetSpot Labs | T3 Tourmaline | Talika | Tancho | Tantowel | Tend Skin | Terax | The Art of Shaving | The Marilyn Brush | Thymes | Tocca | Too Faced | TS2 | Tweezerman | TZCase | Vitabath | Voluspa | Votivo | Wigo | X5 Superlite | Yonka | Yu-Be | Zeno |

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Health &amp; Personal Care

votivo mandarine lotion

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[Search Listmania!](#)**Health & Personal Care > "votivo mandarine lotion"**Did you mean [votive mandarine lotion?](#)

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1.

**Votivo Moisturizing Lotion - Mandarin (12 oz)****\$19.00**[Show only Votivo items](#)

2.

**Votivo Aromatic Hand Lotion - Mandarin (12 oz)**~~\$19.00~~ **\$18.00**[Show only Votivo items](#)Shop for "votivo mandarine lotion" in our [Beauty Store \(1\)](#)

Showing 2 Results

Sort by [Relevance](#)**SPONSORED LINKS (What's this?)****Votivo**[www.AromaEssentials.com](#) Free shipping with \$50 orders. Free gift wrap. Same day shipping.[Buy Votivo Candles Here](#)[ScentsandSprays.com/FREE-SHIPPING](#) Wide selection of **Votivo** Candles Free Same Day Shipping, Buy Now![Votivo Candles for less](#)[www.zanadia.com](#) Large **Votivo** candle selection. Free fast shipping.**Search Feedback**Did you find what you were looking for?  If you need help or have a question for Customer Service, please [visit the Help Section](#).**askville**Can't find what you're looking for? Ask Askville! There's a growing community of people just waiting to [by amazon](#) answer your question. [Give it a try!](#)

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**Save \$10 on Neutrogena**

Get \$10 back when you spend \$49 or more on select [Neutrogena](#) personal care products. [Here's how](#).

## Category

< Any Category

**Health & Personal Care**

Personal Care (34)

## "votivo lotion" > Health & Personal Care

Showing 1 - 24 of 37 Results

< Previous | Page: 1 2 | Next >

Sort by Relevance

## Attribute

**Any Attribute**

Cruelty Free (2)

Natural (19)

Organic (2)

Scented (20)

## Brand

**Any Brand**

Votivo (13)

Antica Farmacista (7)

Tuscany Idea (1)

Get Fresh (2)

Panier des Sens (1)

Innoxia (2)

Michel (4)

> See more...

## Seller

**Any Seller**

Lotus Bathing Luxuries (27)

My Sweet Lips (4)

Planet Beauty (4)

Smallflower (1)

The Beauty Box (1)

## Price

**Any Price**

\$0-\$24 (27)

\$25-\$49 (10)

\$ to \$

Shop for "votivo lotion" in our [Beauty Store](#) (3)













## Listmania!



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1.   
**Red Currant Hand Lotion**  
**\$20.00**  
> Show only Votivo Items
2.   
**Votivo Black Ginger Aromatic Moisturizing Hand Lotion 12 Oz.**  
~~\$17.00~~ **\$15.00**  
> Show only Votivo Items
3.   
**Votivo Aromatic Hand Lotion - Red Currant (12 oz)**  
~~\$19.00~~ **\$18.00**  
> Show only Votivo Items
4.   
**Votivo Moisturizing Lotion - Red Currant (12 oz)**  
**\$19.00**  
> Show only Votivo Items
5.   
**Votivo Moisturizing Lotion - Clean Crisp White (12 oz)**  
**\$19.00**  
> Show only Votivo Items
6.   
**Votivo Moisturizing Lotion - Mandarin (12 oz)**  
**\$19.00**  
> Show only Votivo Items
7.   
**Votivo Aromatic Hand Lotion - Clean Crisp White (12 oz)**  
~~\$19.00~~ **\$18.00**  
> Show only Votivo Items
8.   
**Votivo Moisturizing Lotion - Sea Island Grapefruit (12 oz)**  
**\$19.00**  
> Show only Votivo Items
9.   
**Votivo Blackberry Basil Aromatic Moisturizing Hand Lotion 12 Oz.**  
~~\$17.00~~ **\$15.00**  
> Show only Votivo Items
10.   
**Votivo Aromatic Hand Lotion - Sea Island Grapefruit (12 oz)**  
~~\$19.00~~ **\$18.00**  
> Show only Votivo Items
11.   
**Votivo Aromatic Hand Lotion - Mandarin (12 oz)**  
~~\$19.00~~ **\$18.00**  
> Show only Votivo Items
12.   
**Antica Farmacista Casablanca Lily Body Moisturizer From Italy**  
**\$29.00**  
> Show only Antica Farmacista items

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## Votivo Aromatic Lotion

Other products by [Votivo](#)

No customer reviews yet. [Be the first.](#)

[More about this product](#)



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**List Price:** ~~\$19.00~~

**Price:** \$18.00

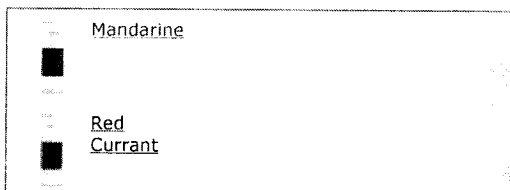
**You Save:** \$1.00 (5%)

**Color Name:**

Select Color Name

**Availability:** In stock. Processing takes an additional 4 to 5 days for orders from this seller. See [shipping date](#) and [pricing chart](#) for details. Ships from and sold by **Beauty In Style**.

**Colors:**



Quantity: 1

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## Special Offers and Product Promotions

- Get free shipping on this item when you purchase 3 or more items from Beauty In Style. [Here's how](#) (restrictions apply)
- Receive 1 [Free flat Iron](#) free when you purchase \$200.00 or more of Qualifying Items offered by Beauty In Style. [Here's how](#) (restrictions apply)

## Product Features

- Twelve ounces of silky, fragrant moisturizer
- Cruelty free - never tested on animals!
- softens and soothes

## Product Description

### Product Description

Moistures your skin from environmental damage, while aloe vera softens and smoothes.

## Product Details

**Shipping Information:** [View shipping rates and policies](#)

**ASIN:** B000P5KBCC

**Average Customer Review:** No customer reviews yet. [Be the first.](#)

**Amazon.com Sales Rank:** #33,640 in Beauty (See [Bestsellers in Beauty](#))

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Click on a tag to find related items, discussions, and people.

[baby bathing](#)

[oat milk](#) (3)

[spa girl](#) (3)

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## Votivo Moisturising Hand Lotion - 12 oz

Other products by [Votivo](#)

★★★★★ ☒ (1 customer review)

[More about this product](#)

**Price: \$18.00**

**Color Name:**

Mandarin

**Availability:** In Stock. See [shipping date and pricing chart](#) for details. Ships from and sold by [Beauty Collection](#).

**Colors:**

[Black Ginger](#)

[Sea Island](#)

[Grapefruit](#)

[Red Currant](#)

Quantity: 1

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### Special Offers and Product Promotions

- Get free shipping on your order when you purchase \$75.00 or more from Beauty Collection. [Here's how](#) (restrictions apply)

### Product Description

#### Product Description

Olive fruit oil and glycerin bind moisture to the skin for protection from environmental damage, while aloe vera softens and smoothes. Enriched with vitamins A,C and E. Scented with the legendary votivo fragrances.

### Product Details

**Shipping Weight:** 1 pounds ([View shipping rates and policies](#))

**ASIN:** B000EOPQ5G

**Average Customer Review:** ★★★★★ ☒ (1 customer review)

**Amazon.com Sales Rank:** #5,495 in Beauty (See [Bestsellers in Beauty](#))

Popular in this category: ([What's this?](#))

#76 in [Beauty](#) > [Skin Care](#) > [Hands & Nails](#) > [Hand Creams & Lotions](#)

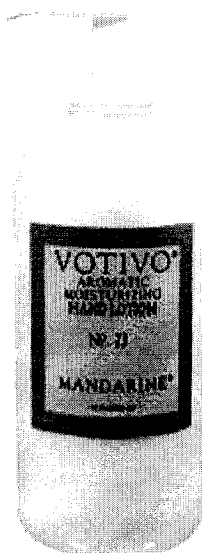
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## Votivo Aromatic Lotion

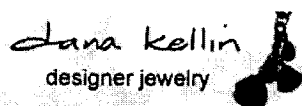


## Colors

Click on swatch to view another color.

- ☐ Sea Island Grapefruit
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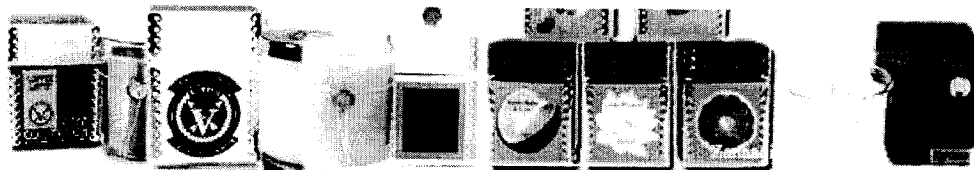
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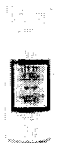
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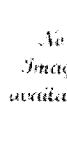
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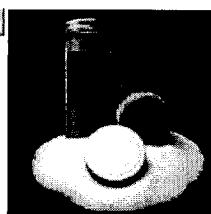
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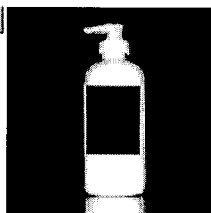
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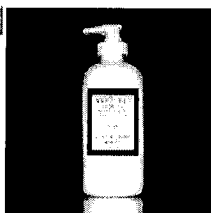
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**BLACKBERRY BASIL HAND LOTION**

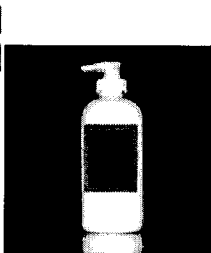
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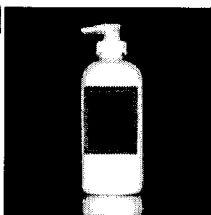

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Brand new 12 oz lotions, made with a blend of Olive Fruit oil and glycerine. Enriched with Aloe and Vitamins A, C and E, available in 12 Votivo scents.

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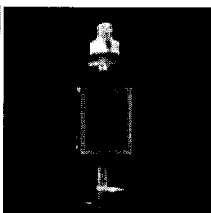

**CLEAN CRISP WHITE LIQUID SOAP**

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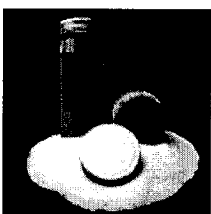
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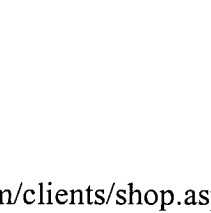
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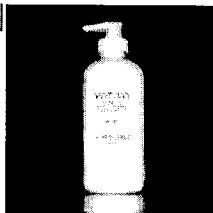
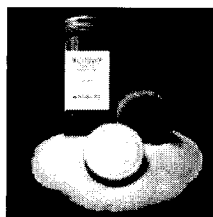
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**HONEYSUCKLE BATH SALTS**

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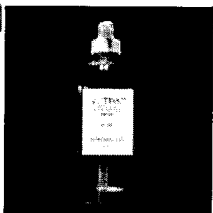
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#### HONEYSUCKLE HAND LOTION

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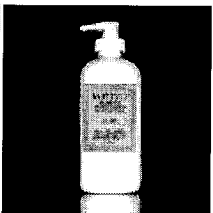
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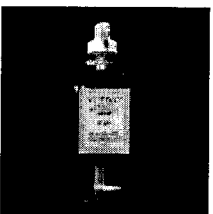
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Brand new 12 oz lotions, made with a blend of Olive Fruit oil and glycerine. Enriched with Aloe and Vitamins A, C and E, available in 12 Votivo scents.



#### ISLAND GRAPEFRUIT LIQUID SOAP

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Now many of your favorite Votivo scents can be found in this 12 oz Liquid Hand Soap. This makes a great kitchen accesory.



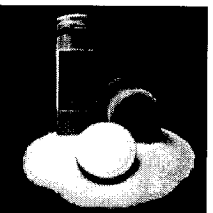
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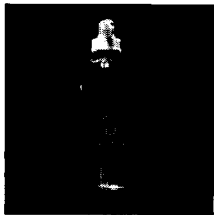







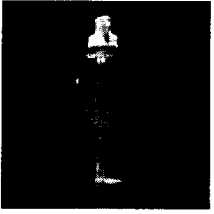

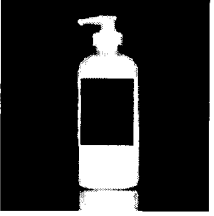

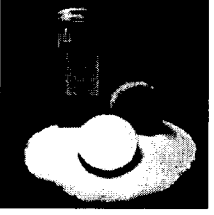

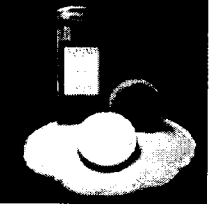

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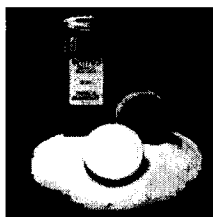


#### MANDARINE LIQUID HAND SOAP

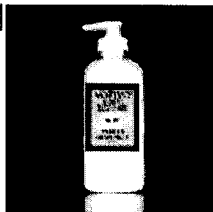
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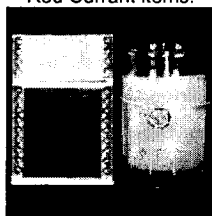
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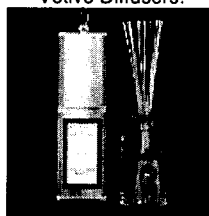
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## Votivo Mandarine Moisturizing Hand Lotion No. 73

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Qty:



Fragrance: Mandarin Orange, Wild Herbs, Sunflower, and Honey. A burst of early summer in every bite, the bold flavor of Mandarin Orange is generously blended with lush meadow lands of Wild Herbs and smiley face Sunflowers sweetened wit ...

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Fragrance: Mandarin Orange, Wild Herbs, Sunflower, and Honey. A burst of early summer in every bite, the bold flavor of Mandarin Orange is generously blended with lush meadow lands of Wild Herbs and smiley face Sunflowers sweetened wit ...

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Fragrance: Mandarin Orange, Wild Herbs, Sunflower, and Honey. A burst of early summer in every bite, the bold flavor of Mandarin Orange is generously blended with lush meadow lands of Wild Herbs and smiley face Sunflowers sweetened wit ...

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## Votivo Mandarine Aromatic Candle No. 73

\$25.00

Qty:



Fragrance: Mandarin Orange, Wild Herbs, Sunflower, and Honey. A burst of early summer in every bite, the bold flavor of Mandarin Orange is generously blended with lush meadow lands of Wild Herbs and smiley face Sunflowers sweetened wit ...

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## Votivo Mandarine Moisturizing Body Wash No. 73

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Qty:



Fragrance: Mandarin Orange, Wild Herbs, Sunflower, and Honey. A burst of early summer in every bite, the bold flavor of Mandarin Orange is generously blended with lush meadow lands of Wild Herbs and smiley face Sunflowers sweetened wit ...

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## Votivo Kyoto Collection Mandarin Teak Candle

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Qty:



Fragrance: Mandarin and Teak. The familiar sensual fragrance of wild Asian citrus and forbidden tropical rain forests greeted her each morning as she lazily opened an eye in search of his familiar presence.  
Votivo Mandarin ...

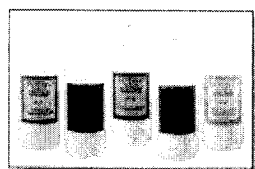
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### Votivo Clean Crisp White Moisturizing Hand Lotion No. 19

Votivo Clean Crisp White Aromatic Moisturizing Hand Lotion No. 19 is fragrancd with a complex yet simple aroma of nothing but clean. 12 fl. oz. >> [more info](#)

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### Votivo Deep Clover Moisturizing Hand Lotion No. 18

Votivo Deep Clover Aromatic Moisturizing Hand Lotion No. 18 is fragrancd with a blend of Red Clover, Fescue Grass, Rye Grass, and Moss. 12 fl. oz. >> [more info](#)

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### Votivo Honeysuckle Moisturizing Hand Lotion No. 68

Votivo Honeysuckle Aromatic Moisturizing Hand Lotion No. 68 is fragrancd with the sweet woody scent of Wild Honeysuckle. 12 fl. oz. >> [more info](#)

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### Votivo Lavender Chamomile Pear Moisturizing Hand Lotion No. 10

Votivo Lavender Chamomile Pear Aromatic Moisturizing Hand Lotion No. 10 is fragrancd with a blend of Lavender, Chamomile, and Pear. 12 fl. oz. >> [more info](#)

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### Votivo Mandarin Moisturizing Hand Lotion No. 73

Votivo Mandarin Aromatic Moisturizing Hand Lotion No. 73 is fragrancd with a blend of Mandarin Orange, Wild Herbs, Sunflower, and Honey. 12 fl. oz. >> [more info](#)

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### Votivo Red Currant Moisturizing Hand Lotion No. 96

Votivo Red Currant Aromatic Moisturizing Hand Lotion No. 96 is fragrancd with a blend of Red Currant, Vanilla Bean, and Raspberry. 12 fl. oz. >> [more info](#)

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### Votivo Sea Island Grapefruit Moisturizing Hand Lotion No. 60

Votivo Sea Island Grapefruit Aromatic Moisturizing Hand Lotion No. 60 is fragrancd with an aroma of freshly squeezed Ruby Red Grapefruit. 12 fl. oz. >> [more info](#)


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**Votivo Vanilla Grapefruit Moisturizing Hand Lotion No. 95**

Votivo Vanilla Grapefruit Aromatic Moisturizing Hand Lotion No. 95 is fragranced with a blend of Vanilla Beans and Grapefruit. 12 fl. oz. >> [more info](#)



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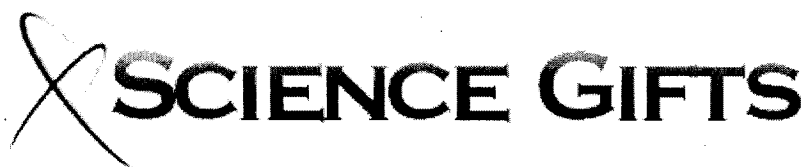
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**Votivo Aromatic Hand Lotion - Mandarin****(12 oz)**

<b>Mfc:</b>	Votivo	Highest
<b>List Price:</b>	<del>\$19.00</del>	Quality
<b>Price:</b>	\$18.00	Lotions
		available.

**Please Note:** Displayed Prices are subject to change without notice.

Please click "more info" for final price before making a purchase.



Search

Beauty

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Advanced Search View Cart Checkout

Location: [Home](#) » [Beauty](#) » [Skin Care](#) » Votivo Moisturising Hand Lotion - 12 oz

3/10/2008

## Subcategories

- [Body](#)
- [Face](#)
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## Related Categories

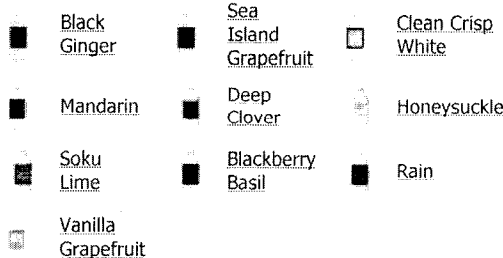
- [Skin Care](#)
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## Votivo Moisturising Hand Lotion - 12 oz



enlarge

## Colors:

Brand: [Votivo](#)Category: [Beauty](#)Buy New: **\$18.00**

## Select Color:

[Black Ginger](#)  
[Blackberry Basil](#)  
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ADD TO CART

Rating: 1 reviews

Sales Rank: 5538

Media: Misc.

ASIN: B000EOPQ5G

Promotion: Data not available [Terms and Conditions](#)

## Similar Items:

- [Votivo Liquid Hand Soap - 12 oz Pump](#)
- [Votivo Aromatic Room Mist](#)
- [Votivo Aromatic Moisturizing Soap](#)
- [Votivo Aromatic Moisturizing Hand Soap](#)
- [Votivo Aromatic Candle](#)

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Search mandarine lotion

Beauty

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Location: Home » Beauty » Votivo Aromatic Lotion

March 11, 2008

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## Subcategories

- Bath & Shower
- Fragrance
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- Makeup
- Men's Grooming
- Shaving & Hair Removal
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- Tools & Accessories

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- Bare Escentuals  
RareMinerals Blomish  
Therapy
- Bare Escentuals  
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Day Comfort Lipstick SPF  
12
- Dior Dior Addict High  
Shine Lipstick

## Bestsellers

- MD Skincare Team  
Perfection, Includes Full-  
Size Alpha Beta Daily Face  
Peel, 30 Applications and

## Votivo Aromatic Lotion



Brand: Votivo  
Category: Beauty

List  
Price: \$49.00  
Buy  
New: \$18.00  
You  
Save: \$1.00  
(5%)

Sorry try again  
Sales Rank: 33728

Media: Misc.

MPN: BIS-  
votivolotion  
ASIN: B000P5KBCC

## Other Views:



## Features:

- Twelve ounces of silky, fragrant moisturizer
- Cruelty free - never tested on animals!
- softens and soothes

## Editorial Reviews:

## Product Description


Moistures your skin from environmental damage, while aloe vera softens and smoothes.

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beauty: Votivo Aromatic Lotion ...

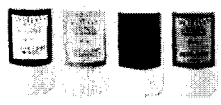

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### • Votivo Aromatic Lotion

Votivo



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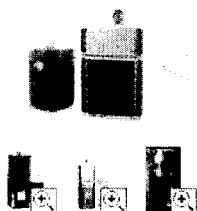
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**Related Products:**

- [Votivo Aromatic Hand Lotion - Red Currant \(12 oz\) - Amazon](#)
- [Votivo Aromatic Hand Lotion - Red Currant \(12 oz\) - Amazon Marketplace](#)
- [Votivo Aromatic Hand Lotion - Sea Island Grapefruit \(12 oz\) - Amazon](#)

search Amazon.com: [votivo hand lotion](#)





Description    Best Deals    [Chitka eMiniMalls](#)

**Best Deal at Smallflower.com**

**Votivo Black Ginger Candle - candle**

Votivo aromatic candles feature fragrances developed by Votivo, hand poured in the US using the finest wax. They are then delightfully wrapped in a uni...





**beauty**


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book: [Chemie verstehen. Ein Lehrbuch für Mediziner und Naturwissenschaftler.](#)

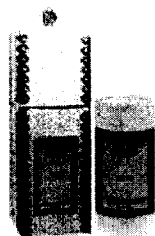
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Votivo Aromatic Room Mist - Mandarinine (4 oz)

List Price: \$14.00  
Our Price: \$16.00

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Votivo Aromatic Lotion

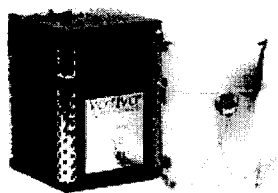
Our Price: \$18.00



- Twelve ounces of silky, fragrant moisturizer
- Cruelty free - never tested on animals!
- softens and soothes

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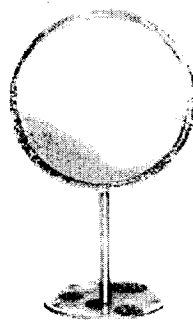
Votivo Joie de Noel Candle

Our Price: \$25.00

- Great Gift Idea
- 50 Hour Burn Time

**Read More**

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Irving Rice "Be Bubbly" Vanity Mirror

Our Price: \$200.00

- 5x magnification
- 6" mirror
- stainless steel stand.
- Pink Bling

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Votivo Aromatic A Christmas Sage 78 Holiday Three Wick

List Price: \$50.00  
Our Price: \$50.00

- Votivo's elegant Christmas scent filled with a touch of holiday

## Related Tags

Aromatic Hand Lotion  
Bear Naked 12 Oz  
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Naked 12 Oz  
Spray 12 Oz  
Votivo Aromatic  
Votivo Aromatic Burning  
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Votivo Aromatic Christmas  
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Votivo Aromatic Poured  
Votivo Aromatic Room  
Votivo Hand Lotion

Home / Health & Personal Care / Personal Care / Skin Care / Hands & Nails / Hand Creams & Lotions



### Votivo Aromatic Hand Lotion - Mandarinine (12 oz) - PB-H-9106999N

by Votivo

Vibrant citrus will dazzle the room. Olive fruit oil and glycerin bind moisture to the skin for protection from environmental damage, while aloe vera softens and smoothes. Enriched with vitamins A,C and E. (12 oz) [read more...](#)

**Product Tags:** [Aromatic](#), [Aromatic Hand](#), [Aromatic Hand Lotion](#), [Hand](#), [Hand Lotion](#), [Lotion](#), [Mandarinine](#), [Pbh9106999n](#), [Votivo](#), [Votivo Aromatic](#), [Votivo Aromatic Hand](#)

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Sort by: Price (low to high)

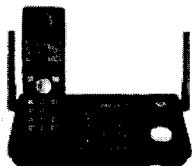
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amazon.com.	Amazon Market Place	\$18.00	<a href="#">Go To Store</a>	<a href="#">View Detail</a>

## Rating:

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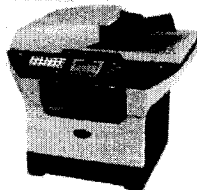
Rating: ★★★★★

We have a 3600 sq.ft. office with over a dozen rooms built with steel studs and this system works flawlessly. We purchased additional handsets and placed them throughout the office, and never have connection or call quality problems



Rating: ★★★★★

I have now 33 years, and I remember when I was twelve all the LP's and cassettes that I had to carry, with an IPOD I now have all the music I want just in my pocket. Great interface. Works with no problem. And does not have windows mobile!!!



Rating: ★★★★★

When I bought a new Apple iMac earlier this year, I found that my HP Laserjet 3200 would not work with the new Apple Leopard OS and HP did not have drivers that would fix the problem. I went shopping at the local office supply stores and read the Amazon reviews and finally settled on this Brother p

[View All](#)

## Product Detail Information:

ASIN:	B000PI3E3W
Sales Rank:	295963
Catalog:	Health and Beauty
Product Group:	Health and Beauty
Product Type:	Health Personal Care
Brand:	Votivo
Manufacturer:	Votivo
Part No:	PB-H-9106999N
Binding:	Health and Beauty

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## Features:

- Highest Quality Lotions available

## Product Description:

Vibrant citrus will dazzle the room. Olive fruit oil and glycerin bind moisture to the skin for protection from environmental damage, while aloe vera softens and smoothes. Enriched with vitamins A,C and E. (12 oz)



## Write Review:

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## Votivo Aromatic Hand Lotion - Mandarinine (12 oz) - PB-H-9106999N

Do you have an opinion on this product?

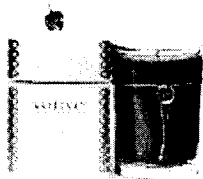
Write your own review and let others know what you think!

Your Name: \*Required

Email Address: \*Optional

Review Title/Summary: \*Required

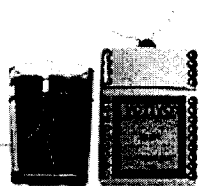
Your Review or Comments about this product:



The fresh scent of an early fresh spring brings to mind the youthful days of childhood past as you rolled the windows down and inhaled the sweet woody scent of Wild Honeysuckle tumbling over roadside bushes and blackberry vines; the aroma is haunting as you travel by.

- **\$25.00** - Votivo #68 Honeysuckle 7.3 oz. Aromatic Candle [Buy Now](#)
- **\$14.00** - Votivo #68 Honeysuckle 7.3 oz. Aromatic Room Mist 4oz. [Buy Now](#)
- **\$9.00** - Votivo #68 Honeysuckle Aromatic Burning Sticks 20 [Buy Now](#)
- **\$8.00** - Votivo #68 Honeysuckle Moisturizing Soap 4.5oz. [Buy Now](#)

## Mandarine



A burst of early summer in every bite, the bold flavor of Mandarin Orange is generously blended with lush meadow lands of Wild Herbs and smiley face Sunflowers sweetened with sun ripened Honey.

- **\$25.00** - Votivo #73 Mandarine 7.3 oz. Aromatic Candle [Buy Now](#)
- **\$14.00** - Votivo #73 Mandarine 7.3 oz. Aromatic Room Mist 4oz. [Buy Now](#)
- **\$9.00** - Votivo #73 Mandarine 7.3 oz. Aromatic Burning Sticks 20 [Buy Now](#)
- **\$8.00** - Votivo #73 Mandarine Moisturizing Soap 4.5oz. [Buy Now](#)

## Vanilla Grapefruit



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**Location:** Home » Beauty Supplies » Skin Care » Votivo Moisturising Hand Lotion - 12 oz Shop: US | CA | UK | DE

## Votivo Moisturising Hand Lotion - 12 oz

Brand: [Votivo](#)

Category: Beauty

**Buy New: \$18.00****Select Color:**

Black Ginger  
 Blackberry Basil  
 Clean Crisp White  
 Deep Clover  
 Honeysuckle  
 Mandarin  
 Rain  
 Sea Island Grapefruit  
 Soku Lime  
 Vanilla Grapefruit

Avg. Customer Rating: ★ ★ ★ ★ ★ 1 reviews

Sales Rank: 5495

Media: Misc.

ASIN: B000EOPQ5G

Promotion: **Data not available** [Terms and Conditions](#)


Availability: Usually ships in 1-2 business days

**Subcategories****Skin Care**

Body  
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 Sun

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| <input type="checkbox"/> <a href="#">Clean Crisp White</a> | <input type="checkbox"/> <a href="#">Mandarin</a>              |
| <input type="checkbox"/> <a href="#">Deep Clover</a>       | <input type="checkbox"/> <a href="#">Honeysuckle</a>           |
| <input type="checkbox"/> <a href="#">Soku Lime</a>         | <input type="checkbox"/> <a href="#">Blackberry Basil</a>      |
| <input type="checkbox"/> <a href="#">Rain</a>              | <input type="checkbox"/> <a href="#">Vanilla Grapefruit</a>    |

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**Similar Items:**

- [Votivo Liquid Hand Soap - 12 oz Pump](#)
- [Votivo Aromatic Room Mist](#)
- [Votivo Aromatic Moisturizing Soap](#)
- [Votivo Aromatic Moisturizing Hand Soap](#)
- [Votivo Aromatic Candle](#)

**Editorial Reviews:****Product Description**

Olive fruit oil and glycerin bind moisture to the skin for protection from environmental damage, while aloe vera softens and smoothes. Enriched with vitamins A,C and E. Scented with the legendary votivo fragrances.

**Customer Reviews:**



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Our Products:

**Votivo Hand Lotion**


SKU: 19685mand.  
Brand: Votivo

Olive fruit oil and glycerin bind moisture to the skin for protection from environmental damage while aloe vera *softens and smoothes*.

Enriched with Vitamins A, C and E. 12-oz pump bottle.

**Price: CDN \$25.50**

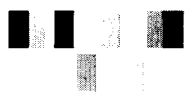
Mandarine

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**My Program Store Home > Beauty : Votivo  
Moisturising Hand Lotion - 12 oz**

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Beauty

from: **Votivo**

Price: \$18.00

Mandarin

**Availability:**  
Usually ships  
in 1-2 business  
days



[See Larger Image](#)

Binding: Misc.  
Brand: Votivo  
Label: Votivo  
Manufacturer: Votivo  
Publisher: Votivo  
Sales Rank: 5495  
Studio: Votivo

**Related Items:**

- [Votivo Liquid Hand Soap - 12 Oz Pump](#)
- [Votivo Aromatic Room Mist](#)
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**Editorial Review:**

**Product Description:**

Olive fruit oil and glycerin bind moisture to the skin for protection from environmental damage, while aloe vera softens and smoothes. Enriched with vitamins A,C and E. Scented with the legendary votivo fragrances.

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In the matter of Trademark Application Serial No. 76/613881  
For the Mark MANDARINE  
Published in the Official Gazette JUNE 5, 2007

MINE DESIGN D/B/A/ OF AMAL FLORES  
(U.S.),

Opposers,

v.

VOTIVO, LTD., a Washington corporation,

Applicant,

VOTIVO, LLC, a South Carolina Limited  
Liability Company,

Defendant

CERTIFICATE OF SERVICE

Opposition No. 91178747

Date of Deposit: March 12, 2008

I hereby certify that the following documents:

1. Applicant's and Defendant's Memorandum (1) in Opposition to Opposer's Motion for Summary Judgment and (2) in Support of Cross-Motion for Summary Judgment;
2. Applicant's and Defendant's Cross-Motion for Summary Judgment;
3. Declaration of Robert E. Caldwell, Jr. (1) in Opposition to Opposer's Motion for Summary Judgment and (2) in Support of Cross-Motion for Summary Judgment; and
4. Declaration of Steve Edmiston (1) in Opposition to Opposer's Motion for Summary Judgment and (2) in Support of Cross-Motion for Summary Judgment

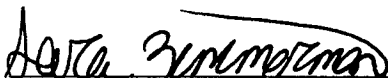
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A handwritten signature in black ink, appearing to read "Sara J. Zimmerman", is written over a horizontal line.

Sara J. Zimmerman